REPORTS OF CASES

DECIDED BETWEEN

MAY 16, 1981 and NOVEMBER 6, 1981

IN THE

Supreme Court of Nebraska

JANUARY TERM 1981 and SEPTEMBER TERM 1981

VOLUME CCIX

DONALD C. PATTON

OFFICIAL REPORTER

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OMAHA, NEBRASKA

1982

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By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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		Samuel P. Caniglia	Omaha
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		John T. Grant	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
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		Bryce Bartu	Seward
Sixth	Burt, Thurston, Dodge, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Saline, Thayer, and Nuckolls	Orville L. Coady	Hebron

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Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin Richard L. DeBacker	Grand Island Grand Island
Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Grant, Hooker, and Thomas	Hugh Stuart Keith Windrum	North Platte North Platte
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

January and September 1981 Terms

No. 42980: **Nebraska State Bank, Ord v. Barta.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43395: **Mid States By Products, Co. v. Janke Diesel Service, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice, each party to pay own costs.

No. 43507: **Altmaier v. City of Kearney.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43520: **Fentress v. Austin Power, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43604: **State Fire Marshal of Nebraska v. Glebe.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 43681: **Russell v. Russell.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

Nos. 43705, 43706: **State v. Austin.** Motion of appellant for rehearing overruled.

No. 43724: **State v. Duncan.** Affirmed in part and in part remanded for further proceedings.

No. 43729: **Pollock v. Pollock.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43750: **Bretthauer v. Bd. of Education.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

Nos. 43770, 43771, 43772: **State v. Wade.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 43794: **Chamberlin v. Chamberlin.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43806: **State v. Carter.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 43808: **Marr v. Vickers-Des Moines Oil Co.**

Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43818: **State v. Greer.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43819: **State v. Scott.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43827: **State v. Greer.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43836: **Wostoupal v. Wostoupal.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43845: **Cahoy v. Mid America Investment Co.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 43855: **State v. Kelley.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 43858: **State v. Walker.** Motion of appellee for summary dismissal sustained; appeal dismissed.

No. 43867: **Valentine Production Credit Assn. v. Brooker.** Settlement approved; by order of the court case remanded per stipulation of the parties.

No. 43882: **State v. Balcom.** Affirmed under Rule 20.

No. 43887: **State v. Ebberson.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 43897: **State ex rel. Root v. Huth.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43907: **State** v. **New.** Affirmed under Rule 20.

No. 43915: **State v. Coleman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 43932: **State v. Floyd.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43933: **State v. Williams.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 43934: **State v. Williams.** Dismissed for failure to file briefs.

No. 43934: **State v. Williams.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43943: **State v. O'Keefe.** Affirmed under Rule 20.

No. 43947: **Scherer v. American Hail Management.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43949: **Ruzicka v. Ruzicka.** Motion of appellant for dismissal of appeal sustained; appeal dismissed; each party to pay own costs.

No. 43954: **State v. Kincaid.** Motion of appellant for suspension of sentence sustained.

No. 43954: **State v. Kincaid.** Motion of appellee for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43959: **Meckel v. Meckel.** Affirmed as modified by report and order of the court.

No. 43960: **Kellogg Savings Bank v. Anderson.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43962: **Hopkins v. Ronzzo.** Affirmed as modified by report and order of the court.

No. 43964: **State v. Segobia.** Motion and stipulation allowed; appeal dismissed with prejudice at costs of appellant.

No. 43967: **State v. Mendoza.** Affirmed; see Rule 20.

No. 43980: **Stevenson v. County Towing.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43987: **Hermance v. Hermance.** Order of court granting motion of respondent to dismiss entered.

No. 43988: **State v. Dunham.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44003: **State v. Patterson.** Affirmed; see Rule 20.

No. 44009: **State v. Russell.** Affirmed; see Rule 20.

No. 44012: **Gardner v. Kearney County Community Hospital.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44014: **Seaton v. Construction Sciences, Inc.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44015: **State v. Degarmo.** Affirmed; see Rule 20.

No. 44018: **State v. Vasquez.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44019: **State v. Sanders.** Motion of court-appointed

counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44024: **State v. Cushing.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44027: **Westlake v. Westlake.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44028: **State v. Steinspring.** Affirmed under Rule 20.

No. 44029: **Forward Kimball Industries, Inc. v. Vowers.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44030: **State v. Zelazny.** Affirmed; see Rule 20.

No. 44032: **State v. Curnyn.** Dismissed for failure to file briefs.

No. 44036: **Ekere v. The Omaha Savings & Loan Assn.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 44037: **State v. Rabbass.** Affirmed; see Rule 20.

No. 44040: **State v. Dedmond.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44044: **State v. Thompson.** Dismissed for failure to file briefs.

No. 44045: **State v. Kiser.** Affirmed; see Rule 20.

No. 44051: **McKay v. Dinslage.** Dismissal of appeal by appellant allowed; appeal dismissed at costs of appellant.

No. 44053: **Vollstedt v. Vollstedt.** Dismissed for failure to file briefs.

No. 44059: **State v. Robinson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44070: **Haug v. Sederstrom.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 44071: **Lanum v. Plattsmouth Metal Parts, Inc.** Dismissal of appeal by appellant sustained; appeal dismissed with prejudice at costs of appellant.

No. 44073: **Gifford v. Gifford.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44075: **State v. Parker.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44076: **State v. McNitt.** Affirmed; see Rule 20.

No. 44077: **State v. Unruh.** Affirmed; see Rule 20; motion of appellee for summary affirmance denied as moot.

No. 44087: **Marvin v. Board of Education.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 44090: **State v. Holman.** Order of May 15, 1981 dismissing appeal for failure to file briefs vacated; motion and stipulation allowed; brief day extended to June 3, 1981.

No. 44090: **State v. Holman.** Affirmed; see Rule 20.

No. 44092: **State v. Wenell.** Affirmed under Rule 20.

No. 44095: **State v. Sedivy.** Motion of appellee for summary dismissal sustained; appeal dismissed at costs of appellant.

No. 44098: **State v. Van Ackeren.** Stipulation allowed; sentence vacated and cause remanded for resentencing.

No. 44099: **State v. Zach.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44101: **State v. Jenkins.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44102: **State v. Parr.** Affirmed; see Rule 20.

No. 44107: **State v. Isaacson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44109: **State v. Anderson.** Affirmed; see Rule 20.

No. 44111: **In re Interest of Ruzicka.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 44116: **State v. Siems.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44123: **Wiester v. Wiester.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44124: **Williams v. Goodyear Tire & Rubber Co.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44128: **State v. Wyman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44129: **State v. Higgins.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44137: **In re Estate of Foote. Foote v. Schissler.**

Motion of appellant for dismissal of appeal sustained; appeal dismissed; each party to pay own costs.

No. 44138: **State v. Freeman.** Affirmed; see Rule 20.

No. 44139: **State v. Johnson.** Affirmed; see Rule 20.

Nos. 44140, 44141: **State v. Rieger.** Motion of appellant to consolidate appeals sustained; motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see rule 20-A(8).

No. 44145: **Vrbka v. Reisdorff.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44146: **State v. Melton.** Affirmed; see Rule 20.

No. 44148: **Guess v. Guess.** Affirmed as modified by order of the court.

No. 44150: **State v. Sell.** By order of the court, the appeal in this case is dismissed as moot without prejudice to further appeal subsequent to the matter currently pending before the District Court.

No. 44153: **State** v. **Benson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44155: **State ex rel. Paris v. Blue.** Motion of appellee for dismissal of appeal sustained; appeal dismissed as moot.

No. 44157: **State v. Hall.** Affirmed; see Rule 20.

No. 44158: **State v. Dawn.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44159: **State v. Moser.** Affirmed; see Rule 20.

No. 44162: **State v. Buzzell.** Affirmed; see Rule 20.

No. 44163: **State v. Vansant.** Affirmed; see Rule 20.

No. 44165: **Rossiter v. County of Sarpy.** Joint motion for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44168: **In re Interest of Taylor.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44173: **State v. Thomas.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

Nos. 44179, 44180: **State v. Vaughan.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44182: **Ehle v. Musgrave Real Estate.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44190: **State v. Anderson.** Affirmed; see Rule 20.
No. 44191: **State v. Perry.** Affirmed; see Rule 20.
No. 44195: **State v. Olson.** Affirmed; see Rule 20.
No. 44197: **State v. Perry.** Affirmed under Rule 20.
No. 44198: **State v. Harrison.** Affirmed under Rule 20.
No. 44200: **State Bank of Merna v. Ellis.** Motion of appellant to dismiss appeal sustained; appeal dismissed.
No. 44202: **Henton v. Henton.** Dismissed for failure to file briefs.
No. 44203: **Callam v. City of Beatrice.** Stipulation for dismissal of appeal allowed; settlement approved; appeal dismissed at costs of appellant.
Nos. 44206, 44207: **State v. Schrader.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
No. 44209: **State v. Conway.** Affirmed; see Rule 20.
No. 44210: **State v. Warford.** Affirmed; see Rule 20.
No. 44214: **Tri Con Liquor, Inc. v. Foster.** Motion for dismissal of appeal sustained; appeal dismissed at costs of appellant.
No. 44216: **City of Madison v. C & R Engineering.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.
No. 44219: **Franz v. Franz.** Affirmed as modified by Report and Order of the Court.
No. 44220: **Maikelis v. Sherwood Homes, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.
No. 44221: **State v. Yoyce.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
Nos. 44226, 44227: **State v. King.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
No. 44232: **State v. Carlisle.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
No. 44234: **State v. McLean.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
No. 44236: **State v. Huston.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.
No. 44238: **Vesper v. Hall.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 44241: **Walker v. Gotsch.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

Nos. 44244, 44245: **State v. Avila.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44249: **S & S Lumber Co. v. Parker.** Stipulation for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44252: **State v. Wiedeman.** Affirmed; see Rule 20.

No. 44254: **State Realty, Inc. v. Wang.** Joint motion for dismissal sustained; order dismissing appeal per stipulation and agreement of the parties entered.

No. 44255: **State v. Molden.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44257: **Brosius v. Gothenburg Feed Products Co.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44258: **Gothenburg Feed Products Co. v. Brosius.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44260: **State v. Kaba.** Affirmed; see Rule 20.

Nos. 44262, 44268: **State v. Campbell.** Affirmed; see Rule 20.

No. 44271: **Rech v. Rech.** Affirmed as modified by report and order of the court.

No. 44272: **Stone v. Stone.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44275: **State v. Armendariz.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44276: **Leising v. Leising.** Affirmed as modified by order of the court.

No. 44278: **State v. Brandy.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44279: **Patchen v. Patchen.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44282: **State v. Gunderson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44284: **State v. Minturn.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44285: **State v. Cherry.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44286: **State v. Brown.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44287: **State v. Horton.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44288: **State v. Jacobs.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44290: **State v. Falcone.** Affirmed; see Rule 20.

No. 44291: **Jeffries v. Jeffries.** Motion of appellee for dismissal of appeal sustained; appeal dismissed as moot.

No. 44296: **Cobb v. Cobb.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44306: **In re Interest of Levy.** Motion of court-appointed counsel for the father for leave to withdraw appearance overruled.

No. 44319: **State v. Drath.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 44321: **Macklin v. Smith.** Affirmed as modified by report and order of the court.

No. 44322: **Vet-Co, Inc. v. Kizzier Leasing Co.** Motion of appellant for dismissal of appeal sustained; dismissed at costs of appellant.

No. 44323: **First Northwestern Trust Co. v. Kafka.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44329: **State v. Doescher.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44330: **State v. Petersen.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44336: **State v. Hershey.** Affirmed; see Rule 20.

No. 44338: **Larsen v. Larsen.** Affirmed as modified by report and order of the court.

No. 44339: **Motsinger v. Bade.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44341: **Commercial Engineering Co. v. Henery.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44345: **State v. Greenwood.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44346: **State v. Roney.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44349: **State v. Vicars.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44353: **State v. Dougherty.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44357: **Metro Lincoln Mercury v. Angelacos.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44366: **State v. Stopak.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44367: **State v. Cook.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44369: **Alexander & Alexander, Inc. v. Alger.** Stipulation to dismiss appeal allowed; appeal dismissed.

No. 44370: **State v. Vaughn.** Affirmed; see Rule 20.

No. 44372: **Quackenbush v. Quackenbush.** Affirmed as modified by report and order of the court.

No. 44374: **Phillips v. Phillips.** Affirmed as modified by report and order of the court.

No. 44384: **Monk v. Monk.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44403: **State v. Mister.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 44404: **State v. Magnussen.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44408: **State v. Arrison.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44410: **State v. Ross.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44411: **State v. Watson.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 44412: **State v. Rayes.** Affirmed; see Rule 20.

No. 44413: **State v. Uland.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44420: **Nichols v. Nichols.** Joint motion for dismissal of appeal sustained; appeal dismissed; each party to pay own costs.

No. 44426: **State v. Bixler.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44430: **Ivory v. Nebraska Furniture Mart.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 44431: **Merriman v. Kratke.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44437: **Derr v. Neville.** Stipulation to dismiss appeal allowed; appeal dismissed.

Nos. 44444, 44445: **State v. Dodd.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44447: **State v. Shropshire.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44449: **State v. Bush.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 44451: **Johnston v. Johnston.** Dismissed for failure to file briefs.

No. 44452: **State v. Hack/Callans.** Motion of appellants for dismissal of appeal sustained; appeal dismissed.

No. 44453: **State v. McKinney.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44454: **State v. Graber.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44466: **Certified Improvements Co., Inc. v. Green.** Dismissed for failure to file briefs.

No. 44467: **State v. Coran.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

Nos. 44468, 44469: **State v. Henshaw.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44470: **State v. Gilmore.** Appeal dismissed for lack of jurisdiction.

No. 44471: **State v. Greene.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20(A)8.

No. 44479: **First Loan Co. v. Wampler.** Motion of appellant to dismiss appeal sustained.

No. 44483: **Richardson v. Schick.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44489: **Ludvik v. Ludvik.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44491: **Herron v. Herron.** Affirmed as modified by order of the Court.

No. 44495: **State v. Kirchhevel.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44499: **ITT Life Ins. Corp. v. Hopfensperger.** Motion of appellee for dismissal of appeal sustained; appeal dismissed as not being from a final order.

No. 44500: **State v. Boyer.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 44507: **State v. Grayer.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44523: **State v. Gladfelter.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44529: **Keister v. Godkin.** By order of the Court, appeal dismissed due to lack of jurisdiction.

No. 44531: **Traxler v. Moore.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44533: **Summers v. Summers.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44536: **Robinson v. Village of Shelton.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 44542: **Old Mill Apartments, LTD. v. City of Omaha.** Affirmed as modified by order of the Court; each party to pay own costs.

No. 81-581: **Smith v. Wolfe.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-582: **Langner v. Langner.** Affirmed as modified by report and order of the Court.

No. 81-585: **In re Valuation, Pawnee County v. State Board of Equalization and Assessment.** Affirmed as modified by order of the Court at costs of appellee.

No. 81-588: **City of Omaha v. Omaha Police Union Local 101.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 81-608: **Ard v. Ard.** Motion of appellant for dismissal of appeal sustained at costs of appellant.

No. 81-632: **Bissen v. Murray.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 81-658: **Kosik v. Board of Education, School District of Gering.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-680: **Cronk v. Cronk.** Affirmed as modified by report and order of the Court.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1981

ROBERT L. SCHMIDT, APPELLANT, V. CHIMNEY ROCK IRRIGATION DISTRICT, A CORPORATION, ET AL., APPELLEES.

305 N.W.2d 888

Filed May 22, 1981. No. 43231.

1. **Equity: Appeal and Error.** In an action in equity, it is the duty of the Supreme Court to try the issues de novo upon the record and to reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case.
2. **Waters: Damages.** Where water from another source has been added to the water for which a defendant is liable and the combined water causes damage, it is incumbent upon the plaintiff to establish either that his entire damages would have occurred from the waters for which the defendant is liable, or to establish the amount of the damage caused by the water for which the defendant is liable.
3. **Injunction.** Injunctive relief is preventive, protective, and prohibitory; it will not issue to afford a remedy for what is past but only to prevent future mischief. Rights already lost and wrongs already perpetrated cannot be restrained or remedied by injunction.
4. **Waters.** Generally, where surface waters, which ordinarily result from rainfall or melted snow, collect and flow into a natural drainage channel or depression, they may not be dammed, diverted, or otherwise repelled by the owner of the land upon which they flow.

Appeal from the District Court for Morrill County: ALFRED J. KORTUM, Judge. Affirmed.

Holtorf, Kovarik, Nuttleman & Ellison, P.C., for appellant.

Winner, Nichols, Meister & Douglas for appellee.

Heard before KRIVOSHA, C.J., WHITE, BRODKEY, and HASTINGS, JJ., and CAPORALE, District Judge.

CAPORALE, District Judge.

Robert L. Schmidt (Schmidt), the plaintiff and appellant herein, sought to enjoin the defendants and appellees, Chimney Rock Irrigation District (District) and its officers, from maintaining its canal as to prevent water from entering plaintiff's irrigation system when water in the District's canal is low, and from flooding plaintiff's land when water in the District's canal is high, as well as for damages resulting from the destruction of Schmidt's Timothy hay meadow. The District sought to quiet title to the canal in itself against any claimed right of Schmidt to flow water over, under, or across the canal.

The trial court denied the plaintiff any relief and found that the District's title to the land on which the canal is situated is superior to any claimed right of the plaintiff to flow water over, under, or across the canal. For the reasons hereinafter set forth, we affirm the decision and judgment of the trial court.

This is an action in equity; it is therefore the duty of the Supreme Court to try the issues de novo upon the record and to reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980); *Engel v. Rhen Marshall, Inc.*, 206 Neb. 265, 292 N.W.2d 307 (1980).

We find the pertinent facts to be that the District's predecessor acquired, in 1894, fee simple ownership

of a strip of land 60 feet wide adjacent to the section line between Section 24, Township 20 North, Range 52 West of the 6th P.M., and Section 19, Township 20 North, Range 51 West of the 6th P.M., in Morrill County, Nebraska. The canal in question, which returns the District's waste water to the North Platte River, was built on this right-of-way sometime prior to 1914; it runs generally from north to south. Schmidt owns land to the east of and adjacent to the canal on which he has maintained a Timothy hay field. Since 1933 plaintiff and his predecessors have irrigated their land with water from Fawcus Springs, located to the west of the District's canal. The District has maintained a flume or other devices in its canal so as to allow water to flow from Fawcus Springs under the canal onto plaintiff's land through an artificial, manmade drainage channel. Water did discharge from the canal onto plaintiff's land in 1974 through a hole in the flume structure; however, that has not occurred since plaintiff's tenant Rogers repaired the hole and flume structure. Such difficulty as Schmidt experienced in getting water from Fawcus Springs onto his land during the same period was due to the inadequacy of his irrigation system.

Neb. Const. art. I, § 21, provides that no property shall be damaged for public use without just compensation therefor. We have held in the past that an irrigation district is liable, without negligence, for damages occasioned by seepage of its waters. *Halstead v. Farmers Irr. Dist.*, 200 Neb. 314, 263 N.W.2d 475 (1978); *Applegate v. Platte Valley Public Power and Irrigation District*, 136 Neb. 280, 285 N.W. 585 (1939); *Baum v. County of Scotts Bluff*, 169 Neb. 816, 101 N.W.2d 455 (1960). In *Lindgren v. City of Gering*, 206 Neb. 360, 292 N.W.2d 921 (1980), we found the evidence established that the Gering Irrigation District had been negligent in failing to repair a break in its canal. We observed, however, that even in the absence of negligence we would have affirmed the

trial court's finding of liability on the part of the District, but found it unnecessary to decide that case on the basis of strict liability in view of the fact that specific acts of negligence had been pleaded and proved. The evidence here establishes that, because of a hole in its canal, the District discharged its water onto plaintiff's land. It fails, however, to establish that the discharge of the District's water onto plaintiff's land was a proximate cause of plaintiff's damage; it could just as well have been entirely due to plaintiff's inadequate irrigation system. It is the plaintiff's burden to establish the proximate cause of his injury. *McGill v. Card-Adams Co.*, 154 Neb. 332, 47 N.W.2d 912 (1951). See, also, Restatement (Second) of Torts § 430, Comment e, and § 431, Comment e (1965), stating the necessity that conduct be a legal cause of the harm is equally applicable where the conduct results in strict liability as when it is negligent.

Even if it were to be assumed arguendo that the damages were caused by the combination of both the inadequacy of Schmidt's irrigation system and the discharge of the District's canal water onto plaintiff's land, the evidence still would not allow us to award damages. The record does not apportion the damage caused by the District's water, if any, and the damage caused by plaintiff's inability to irrigate, if any. Where water from another source has been added to the water for which a defendant is liable and the combined water causes damage, it is incumbent upon the plaintiff to establish either that his entire damages would have occurred from the waters for which the defendant is liable, or to establish the amount of the damage caused by the water for which the defendant is liable. *McGill v. Card-Adams Co., supra; Seibold v. Whipple*, 143 Neb. 167, 9 N.W.2d 154 (1943).

We turn now to the question of whether plaintiff was entitled to injunctive relief. The evidence is that the flume structure has been repaired and the District's

canal water is not presently being discharged onto plaintiff's land. Injunctive relief is preventive, protective, and prohibitory; it will not issue to afford a remedy for what is past but only to prevent future mischief. Rights, if any, already lost and wrongs, if such, already perpetrated cannot be restrained or remedied by injunction. *Stuthman v. Lippert*, 205 Neb. 302, 287 N.W.2d 80 (1980); *Michelsen v. Dwyer*, 158 Neb. 427, 63 N.W.2d 513 (1954). Accordingly, Schmidt is not entitled to the injunctive relief he seeks.

The remaining issue concerns that portion of the trial court's judgment which finds that the District's title to the land on which its canal is located is "superior to any claim of the Plaintiff to flow water under or over or across said canal." The evidence clearly establishes that the District has fee simple title to the land on which its canal is located. The question concerns Schmidt's right to flow water under and across the canal structure. Plaintiff has neither pled nor proved the acquisition of any right to so flow water across defendants' land. It has been held that, generally, where surface waters, which ordinarily result from rainfall or melted snow, collect and flow into a natural drainage channel or depression, they may not be dammed, diverted, or otherwise repelled by the owner of the land upon which they flow. *Sullivan v. Hoffman, supra; Rolfsmeyer v. Seward County*, 182 Neb. 348, 154 N.W.2d 752 (1967); *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962).

The judgment of the District Court is affirmed.

AFFIRMED.

DALEE REALTY, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. DONALD KUHL AND VAYLE KUHL, HUSBAND AND WIFE, APPELLEES AND CROSS-APPELLANTS.

305 N.W.2d 891

Filed May 22, 1981. No. 43254.

1. **Brokers: Options to Buy or Sell.** A broker is not entitled to a commission from a seller for producing a ready, willing, and able buyer, where the buyer is only willing to execute an option and the seller does not prevent exercise of the option.
2. **Contracts: Options to Buy or Sell.** The nature of a contract as an option or obligation to purchase is to be determined not by the name which the parties have given it but by the nature of the obligation which it imposes.
3. **Options to Buy or Sell.** An option is a binding offer to sell or buy, but is not a purchase agreement.
4. **Contracts.** Where a contract is on a regular printed form prepared by one party, an ambiguous provision in the printed portion should be construed most strictly against such party.

Appeal from the District Court for Cedar County: FRANCIS J. KNEIFL, Judge. Affirmed in part, and in part reversed with directions to dismiss.

Warren L. Reimer of Ptak, Ptak & Reimer for appellant.

Olds, Swarts & Ensz for appellees.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and HENDRIX and KNAPP, District Judges.

HENDRIX, District Judge.

This is an action by the plaintiff, DaLee Realty, Inc., a real estate broker, to recover commission upon a listing contract between plaintiff and defendants, Donald Kuhl and Vayle Kuhl, the owners of land, buildings, fixtures, bees, and equipment which were for sale. A jury was waived, and the case tried to the court on stipulated facts. The district judge found against the plaintiff for commission, but for the plaintiff for expenses in the sum of $2,064.24. The plaintiff appealed and the defendants cross-appealed.

We affirm the denial of commission and reverse the allowance of expenses.

The listing contract is entitled "Farm Listing Contract," is a form contract, and states that it was approved by the Nebraska Realtors Association in 1972. It contains two printed provisions particularly important to the resolution of the controversy. The first of these to appear provides for the payment of a commission of 7 percent of the sale price upon the happening of any of a number of certain events, among them one stating, "If a sale is made, or a purchaser found, who is ready, willing and able to purchase the property . . . ." The second of these provides for the payment of expenses incurred by the agent on conditions stating, "If a Purchase Agreement is entered into and subsequent thereto, any earnest money payment is returned in full to the prospective purchaser for any reason . . . ."

After the parties entered into the listing contract, plaintiff secured a prospective buyer by the name of Lyle DeBrunner. Mr. DeBrunner's attorney prepared a document entitled "Purchase Agreement," which was executed by defendants and Mr. DeBrunner on March 7, 1978. The agreement contained complete and full terms of purchase for the sum of $265,000. However, one of the provisions called for a downpayment of $1,000 in escrow by the prospective purchaser, and further stated: "If Buyer does not accept the terms of this contract on or before March 15, 1978, the earnest money shall be returned to Buyer and this contract shall be null and void." On March 15, 1978, Lyle DeBrunner notified the escrow agent and one of the defendants that he was not exercising his right to purchase. The transaction was never consummated.

Both the listing contract and the purchase agreement recited that among the items for sale were 1,800 colonies (of bees). The parties stipulated that if Lyle DeBrunner were called to testify, he would testify that

he did not exercise his right to purchase because he counted 860 beehives in Texas. It was further stipulated that if defendants were called to testify, they would testify that the maximum number of beehives which the defendant Donald Kuhl had would be 1,400. It was further stipulated that the plaintiff's expenses incurred relative to the listing contract were $2,064.24.

Under the agreement between Lyle DeBrunner and the defendants, Lyle DeBrunner had the option to make the purchase. He had no obligation to complete the transaction until or unless he exercised his option by acceptance of the contract on or before March 15, 1978. This he did not do, and in fact notified the defendants that he was not accepting the contract. On March 7, 1978, Mr. DeBrunner was only ready, willing, and able to execute a contract giving him an option to buy. He was not ready, willing, and able to buy. On March 15, 1978, Mr. DeBrunner was, of course, still not willing to buy.

It is the general rule that a broker is not entitled to a commission for producing a prospective buyer willing only to execute an option. 12 C.J.S. *Brokers* § 149b (1980); 12 Am. Jur. 2d *Brokers* § 188 (1964). More specifically, a broker is not entitled to a commission unless he has substantially performed what he has undertaken by his contract of employment. *Willard v. Preston*, 92 F.2d 851 (8th Cir. 1937). Since the plaintiff has not substantially performed, it is not entitled to recover commission.

The fact that there were fewer beehives than stated does not change this conclusion. This is not a suit for fraud or misrepresentation, nor is it a suit for damages. It is, instead, a suit on contract, alleging full performance. There has been no performance of the contract. There is, of course, an exception to the general rule which may allow recovery of commission in cases where the seller prevents the exercise of the option. Annot., 32 A.L.R.3d 321 at 339 (1970). While the shortage of bees may have been the reason for a failure

to exercise the option, there is no evidence that the seller prevented the exercise of the option.

The cross-appeal requests reversal of allowance of plaintiff's expenses incurred, on the theory that the instrument denominated "Purchase Agreement" was in reality an "Option Contract" and does not qualify under the conditions of the listing contract. We find this to be a correct position. It should be noted that the character of an instrument is determined not by the name which the parties have given it but by the nature of the obligation which it imposes. *Johnson v. Fitzke*, 234 Minn. 216, 48 N.W.2d 37 (1951). The agreement involved here imposes only an option. It should be further noted that purchase agreements and option contracts are mutually exclusive. A purchase agreement, or an agreement to purchase, is the contract by which one agrees to sell and the other to buy. An option is only a binding offer to sell or to buy. 77 Am. Jur. 2d *Vendor and Purchaser* § 28 (1975); 91 C.J.S. *Vendor and Purchaser* § 5 (1955). The instrument cannot be both.

Lastly, any ambiguity must be construed against plaintiff. Where a contract is on a regular printed form prepared by one party, an ambiguous provision in the printed portion should be construed most strictly against such party. *Lyman-Richey Sand & Gravel Co. v. State*, 123 Neb. 674, 243 N.W. 891 (1932).

The judgment of the District Court is affirmed as to the denial of commission, reversed as to the allowance of expenses, and it is directed that plaintiff's petition be dismissed at plaintiff's costs.

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS TO DISMISS.

VIOLA M. BIBOW, APPELLANT AND CROSS-APPELLEE, V. NORMAN L. GERRARD ET AL., APPELLEES AND CROSS-APPELLANTS.

306 N.W.2d 148

Filed May 22, 1981. No. 43340.

1. **Fraud: Damages.** Where there has been misrepresentation in the sale of real estate, the measure of damages is the difference between the value of the property conveyed and the value of the property if it had been as represented.
2. **Deeds.** Upon delivery and acceptance of an unambiguous deed, all prior negotiations and agreements are deemed merged therein.
3. **Fraud.** Where ordinary prudence would have prevented the deception, an action for the fraud perpetuated by such deception will not lie.

Appeal from the District Court for Saunders County: BRYCE BARTU, Judge. Reversed and remanded with directions.

John Tavlin and Healey, Brown, Wieland, Kluender, McCord & Atwood for appellant.

Loren L. Lindahl of Edstrom, Bromm & Lindahl for appellees.

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman & Thomsen for amicus curiae.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and MARTIN, District Judge.

BOSLAUGH, J.

This case arises out of a controversy concerning a sale of real estate in Saunders County, Nebraska. The defendants Norman L. Gerrard and Lorraine R. Gerrard owned a house and a bar which was located on a 3.65-acre tract of land near Cedar Bluffs, Nebraska. On June 1, 1976, the Gerrards listed this property for sale with the defendant Gateway Realty of Fremont, Inc. In the listing agreement the property was described as follows: "Address Rt. 1 Cedar Bluffs Legal Description NW¼ Sect. 22-17-7 15 acres more or less."

Gateway advertised the property for sale, stating that it consisted of "approximately 15 acres." The plaintiff read the advertisement and contacted the defendant Brad Martindale, a licensed real estate agent employed by Gateway. The plaintiff arranged to meet Martindale at the property on July 8, 1976. According to the plaintiff, her son-in-law, who was present, asked Martindale where the 15 acres were. Martindale then pointed out the boundaries of the property. Later, Mr. Gerrard pointed out the same boundaries to the plaintiff.

After looking over the Gerrard property, the plaintiff signed a written offer to purchase it for $37,500. The property was described in the purchase agreement as follows: "Address RR Cedar Bluffs, Nebr. Legal Description Approximately 15 acres more or less with a 3 bedroom home and bar." The Gerrards accepted the offer and signed the purchase agreement on July 8, 1976.

The purchase agreement was conditioned upon the purchaser "being able to obtain a liquor lisence [sic] equal to the lisence [sic] held by the sellers." Before closing the transaction the purchaser filed an application for a liquor license which contained a correct description of the property by metes and bounds and disclosed that the dimensions of the tract were approximately 200 feet by 794 feet.

A liquor license was not issued to the plaintiff until September 10, 1976, but the transaction was closed sometime in August. The plaintiff paid the balance of the purchase price and the Gerrards executed and delivered a deed conveying the property to the plaintiff. The deed described the property by metes and bounds and disclosed that the tract was approximately 200 feet by 794 feet.

This action was commenced on May 14, 1979. In her first cause of action the plaintiff sought to recover damages in the amount of $24,970 from the Gerrards for breach of contract. The second cause of action

was against all defendants for fraud and misrepresentation. The third cause of action sought damages from the Gerrards for breach of warranty.

The trial court found that the defendants had represented that the property consisted of 15 acres; that the plaintiff had relied upon the representation; and that the Gerrards had breached the contract by failing to convey more than 3.65 acres. The trial court fixed the damages at $6,100.

The plaintiff has appealed and the Gerrards have cross-appealed. The appeal relates only to the first and third causes of action. Since there was no warranty in the purchase agreement other than an agreement "to convey title to said property," the third cause of action for breach of warranty may be disregarded.

The assignments of error all relate to the amount of the recovery. The plaintiff contends that the trial court should have awarded her damages in the amount of $15,028.62. The contention is based upon an erroneous interpretation of the rule stated in *Ready Sand & Gravel Co. v. Cornett*, 184 Neb. 726, 171 N.W.2d 775 (1969), and opinion testimony of an expert witness called by the plaintiff. This witness testified that the value of the land was $1,800 per acre; the buildings, $25,400; and the property actually conveyed, $31,400.

The expert testimony as to value was not binding on the trial court. It is apparent from the record that the trial court did not accept the expert testimony in full.

The trial court found that the value of the property as represented was $37,500, the price that the parties had agreed upon; the value of the property conveyed was $31,400; and that the damages were the $6,100 difference between these amounts.

Generally, where there has been misrepresentation in the sale of real estate, the measure of damages is the difference between the value of the property conveyed and the value of the property if it had been as represented. See, *Dargue v. Chaput*, 166 Neb. 69,

88 N.W.2d 148 (1958); *Rothery v. Pounds*, 150 Neb. 25, 33 N.W.2d 347 (1948); *Falkner v. Sacks Bros.*, 149 Neb. 121, 30 N.W.2d 572 (1948). See, also, Annot., 13 A.L.R.3d 875. The plaintiff's assignments of error are without merit.

On the cross-appeal, the Gerrards' principal contention is that the plaintiff is barred from recovering damages by the doctrine of merger. The rule of merger, stated simply, is that upon delivery and acceptance of an unambiguous deed all prior negotiations and agreements are deemed merged therein. See, *Ingraham v. Hunt*, 159 Neb. 725, 68 N.W.2d 344 (1955); *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977); *Hoke v. Welsh*, 162 Neb. 831, 77 N.W.2d 659 (1956). However, the doctrine of merger does not apply where there has been fraud or mistake.

The evidence in this case was undisputed that the number of acres being sold was misrepresented and the trial court found that the plaintiff had relied upon the representation. However, not all misrepresentations are actionable. It has long been the rule in this state that the reliance must be justified before it is actionable. Where ordinary prudence would have prevented the deception, an action for the fraud perpetuated by such deception will not lie. *Growney v. C M H Real Estate Co.*, 195 Neb. 398, 238 N.W.2d 240 (1976).

In this case the plaintiff inspected the property and the boundaries were pointed out to her. She filed an application for a liquor license which disclosed that the tract was approximately 200 feet by 794 feet. This description was contained in the deed executed at the time of closing.

The discrepancy in acreage between the amount claimed and the amount conveyed in this case was substantial. Some courts have stated there can be no recovery if the shortage is so glaring and palpable as to warn even an inexperienced purchaser. See *Loehr v. Manning*, 44 Wash. 2d 908, 272 P.2d 133

(1954). See, also, *Ralston v. Grinder*, 8 Ohio App. 2d 208, 221 N.E.2d 602 (1966), where purchasers' execution of second mortgage containing correct description was held to be notice.

The plaintiff here was not entirely inexperienced in real estate transactions. In 1966 or 1967, the plaintiff purchased a 4-acre tract near Cedar Bluffs which she subdivided and platted in 1976.

We believe the circumstances in this case were such that the plaintiff's reliance upon the defendants' representation was not justified. Since the misrepresentation was not actionable, the doctrine of merger is applicable and bars the plaintiff's recovery.

The judgment of the District Court as to the defendants Gerrard is reversed and the cause remanded with directions to dismiss the action as to the defendants Gerrard.

REVERSED AND REMANDED WITH DIRECTIONS.

RODNEY R. WATKINS, APPELLEE, V. SUZANNE WATKINS, APPELLANT.

305 N.W.2d 894

Filed May 22, 1981. No. 43386.

Alimony. In determining whether alimony should be awarded, the ultimate test is one of reasonableness.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed as modified.

P. M. Conley for appellant.

James E. Gordon and Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage, awarded custody of the minor children, divided the marital property, and awarded alimony and child support to the respondent wife.

The parties were married in 1960. They have two minor children: Rodney, Jr., born August 10, 1961, and Karen, born June 1, 1963. A third child has reached his majority and was not affected by this proceeding.

The trial court awarded joint custody of the minor children to both parties. Physical custody of Rodney, Jr., was placed in the petitioner with reasonable rights of visitation granted to the respondent. Physical custody of Karen was placed with the respondent for the first 6 months and with the petitioner for the next 6 months, the physical custody to alternate between the parties during each succeeding 6-month period and with reasonable rights of visitation granted to each party during the time physical custody is placed with the other party.

Child support in the amount of $150 per month was awarded to the respondent during the time that she has physical custody of Karen. The petitioner was required to maintain health and accident insurance on the children until each of them has reached the age of majority.

The parties owned a residence property which they stipulated had a value of $42,000 and was subject to a mortgage in the amount of approximately $9,400. The property had been purchased in February 1976 from the respondent's mother for $16,000. The purchase agreement required the parties to provide "room, board and care, except medical care, in the home" to the respondent's mother for her lifetime. The respondent's mother suffered a stroke in October 1976 and has not been cared for in the home since that date. The trial court awarded the residence property to the respondent, subject to a note and second

mortgage to the petitioner in the amount of $16,500. The note was to become due at the time Karen becomes 19, the property was sold, or upon the respondent's death or remarriage, whichever is sooner. The note was to draw interest from the date it became due. The respondent was required to make the mortgage payments on the property.

The respondent was awarded alimony in the amount of $200 per month for 28 months, and thereafter in the amount of $100 per month for 32 months.

The respondent has appealed and contends that the child support and alimony which were awarded to her were inadequate and that provisions in regard to the residence property were erroneous.

At the time of trial, January 28, 1980, the respondent was 46 years of age. Although she had not worked since the marriage, she had been employed as a waitress and had done office work before the marriage. An ileostomy operation had been performed upon her 3 years before, she had phlebitis in one leg, and cataracts were forming upon her eyes. The record does not otherwise show whether she would be able to find employment at this time, but she testified that she would attempt to find employment.

The petitioner's age is not shown in the record. He had retired from the Air Force and was presently employed by a distributing company. His *gross* income was $12,931.60 in 1977 and $15,885.24 in 1978, including retirement pay. His current *net* income at the time of trial was $680.50 per month, plus Air Force retirement of $596.65 per month.

The respondent requests that the judgment be modified to increase the amount of the child support and alimony awarded to her and to increase her share of the marital property.

In determining whether alimony should be awarded, the ultimate test is one of reasonableness. *Baird v. Baird*, 196 Neb. 124, 241 N.W.2d 543 (1976). The total obligation imposed upon the party and that party's

ability to make the payments required must be considered in determining whether the award made was erroneous.

Rodney, Jr., became of age on August 10, 1980. Karen will be 19 on June 1, 1982. The obligation for child support payments under the judgment will terminate at that time. We find nothing in the record to require a modification of the award of child support.

Although the evidence shows the respondent has some health problems, there is no indication that she is unemployable. Her greatest handicap appears to be a lack of skills or prior training. The award of alimony which was made will give the respondent an opportunity to obtain further training to enhance her opportunity for employment.

The division of property appears to have been approximately equal between the parties. However, we believe it would be more equitable to award the residence property to the respondent subject only to the mortgage indebtedness of approximately $9,400. This property was acquired from the respondent's mother for much less than its market value, and the obligation to provide room, board, and care to her mother proved to be of short duration. Under these circumstances and all the other facts in the case, we believe the judgment should be modified to eliminate the provision awarding the petitioner the note and second mortgage in the amount of $16,500 on the property. As so modified, the judgment is affirmed.

The respondent is allowed the sum of $500 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF MICHAEL TIMOTHY WOOD, RON FITZGERALD LINDEN, AND JAMES EUGENE LINDEN, MINOR CHILDREN UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA, APPELLEE, V. NORMA ELEANOR LINDEN, APPELLANT.

306 N.W.2d 151

Filed May 22, 1981. No. 43406.

1. **Juvenile Courts: Parental Rights.** Neb. Rev. Stat. § 43-209 (Reissue 1978) sets out six independent conditions, any one of which existing alone will justify termination of parental rights.
2. _____:_____. There is no requirement that the court must implement a rehabilitation program for the parent of a child found to be dependent and neglected.
3. **Parental Rights.** The right of a parent to custody and control of his or her child is not an inalienable right.
4. **Child Custody.** The public has a paramount interest in the protection of children from abuse and neglect.
5. _____. The principal concern in custody cases is the best interests of the child.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed.

Richard G. Kopf of Cook & Kopf, P.C., for appellant.

Byron W. Fallesen, Deputy Dawson County Attorney, and Glenn A. Clark for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

Appellant appeals from an order of the District Court for Dawson County, Nebraska, affirming an order of the Dawson County Court terminating appellant's parental rights in three of her sons, Michael Timothy Wood, Ron Fitzgerald Linden, and James Eugene Linden. A fourth son, Joey Adam Donner, was born subsequent to the termination order of the county court, and appellant's parental rights as to Joey Adam Donner are not at issue here. Summonses were served on the putative fathers (apparently as

identified by appellant) of Ron and James Eugene (called Gene), but neither appeared in the proceedings by counsel or otherwise. Service was attempted on the putative father of Michael Timothy (called Tim), but he could not be located by the sheriff. We therefore consider here only the rights of the biological mother, without prejudice to any rights of the putative father. See, *In re Interest of Witherspoon*, 208 Neb. 755, 305 N.W.2d 644 (1981); *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981).

The petition in this case, filed in September 1977, alleged that Tim and Ron were children within the meaning of Neb. Rev. Stat. § 43-202(2) (Reissue 1978), in that they "lack proper parental care by reason of the faults or habits of their parent, and that they are in a situation dangerous to life or limb." The evidence reflects that for several months prior to the filing of the petition, Tim and Ron were attending the Child Development Center in Cozad, a day school for developmentally disabled children. On several occasions, both boys came to school with bruises and scratches which aroused the suspicion of center staff members. The boys were examined by a doctor with reference to the injuries. On at least one occasion, Tim reported that "dad" had hit him with a stick, "dad" apparently being James Donner with whom appellant was living. Tim reported that "Mom did it," with reference to Ron's bruises on another occasion. Development center personnel contacted police and also the Multi-County Social Service Unit in Lexington. Appellant was a client of the unit and Lois Hayes of that agency discussed the boys' bruises with appellant and Donner. While Hayes did not accuse either appellant or Donner of inflicting the bruises on the boys, she did tell them that the bruises must stop and explained the possibility of appellant losing custody should the bruises be found to be the result of child abuse. Shortly thereafter, appellant came to Hayes' office and angrily terminated her

relationship with the unit, stating to Hayes that she did not "have any witnesses."

The petition was filed on September 26, 1977, in Dawson County Court. A hearing was held on September 26, 1977, and following that hearing the children were ordered left in appellant's custody until further hearing. On October 19, 1977, the county attorney of Dawson County filed an affidavit stating that Ron had appeared at the South Central Child Developmental Day-Care Center with "numerous bruises and scratches," and asking that both boys be taken into immediate custody. This request was granted by the court on the same day.

On October 24, 1977, an adjudication hearing was held, at which evidence was presented on the issue of the boys' status as children within the meaning of § 43-202(2). At that hearing, a neighbor, Mrs. Beulah Helberg, testified that on two occasions she had seen appellant strike both Ron and Tim repeatedly with a hard object of some kind while the boys were lying on the ground. Reports of the doctor and the development center staff were also admitted into evidence at this hearing, including the above-mentioned statements of Ron and Tim as to how they got the bruises. Nevertheless, the court ordered the children returned to appellant "as soon as reasonably possible" upon several conditions. One of the conditions was that Donner "refrain from residing in the home . . . until such time as he is able to demonstrate to the Court that he has consulted with a mental health professional regarding the imposition of appropriate discipline upon minor children." For reasons that do not appear in the record, the boys were returned to the custody of appellant while Donner was residing with her, and the record does not reflect that the required showing was made before their return.

On March 13, 1978, the county attorney filed another affidavit, this one showing that on February 27, 1978, and March 8, 1978, Ron again came to the

development center with injuries, which included a burn as well as bruises, and asking that a guardian ad litem be appointed for Tim and Ron. On March 17, 1978, a guardian ad litem was appointed and authorized to have the children examined by an independent physician, but again the boys were left in appellant's custody. On April 7, 1978, the guardian ad litem filed his report with the court, concluding that Tim and Ron had "indeed suffered injuries inconsistent with normal discipline" and recommending that they be removed from appellant's custody and placed in foster care for a minimum of 6 months. He also recommended that appellant be ordered to attend parenting classes and individual mental health therapy, and that Donner "have absolutely no contact with the . . . children . . . until he has demonstrated to this court that he has consulted with a mental health professional and that the results of such examinations have been presented to this court."

No action was taken on the guardian ad litem's recommendations until after the filing of yet another affidavit by the county attorney on April 24, 1978. The incident which prompted the filing of this affidavit is reflected in the evidence adduced at a hearing on this affidavit on April 24. The evidence showed that on the night of April 20, 1978, Lexington police were notified that the children were left alone in the trailer. Police investigated and found that the three boys, including Gene, were indeed alone in the trailer; that Gene was having trouble breathing due to a respiratory ailment, that he had a diaper rash so severe that scabs were forming on his legs, and that he was in his crib without covers; that Tim was asleep on a bed in the trailer without covers; that Ron was asleep on the floor next to the bed, wrapped in a blanket; and that the trailer was filthy. The officers removed the children from the trailer and they were placed in emergency foster care.

The affidavit filed after this incident for the first

time requested that appellant's parental rights be terminated. The court, after this hearing, ordered that the boys be placed in foster homes subject to reasonable rights of visitation by appellant.

On May 23, 1978, a hearing was held on the request to terminate appellant's parental rights. The previous adjudication of Tim and Ron as children within § 43-202(2) was allowed to stand, and Gene was also adjudicated such a child. The court then found that termination of parental rights was unwarranted at that time, but left the boys in foster homes subject to reasonable rights of visitation in appellant, excluding overnight visits. He ordered appellant into psychiatric counseling for 6 months and set a further hearing date of November 28, 1978.

At the second dispositional hearing in November, the report of appellant's counselor, Anthony Phillips, discussed the counseling he had done with appellant and concluded that there had been no significant change in appellant's parenting ability; that her therapy progress had been minimal; and recommended that Donner attend both group and individual counseling since "the children might legally be placed back with Mrs. Linden, but they will realistically live with both [her] and Mr. Donner." The court again refused to terminate appellant's parental rights. Its order, after this hearing, "encourage[d] specific attempts by the parties to implement regularly scheduled meaningful visitations," ordered another 6 months of counseling, and set a further dispositional hearing for May 31, 1979. This hearing was finally held on July 24, 1979.

At the July hearing, reports of both Phillips and Dr. Reba White, who took over as appellant's counselor after Phillips resigned, demonstrated that appellant had made very little progress in working through her emotional problems and tended to blame others for her lot in life rather than accepting responsibility for her own actions. Visitation, including overnights, had

been arranged, but the evidence showed that on at least one occasion Gene was returned to his foster home with a black eye after visiting with appellant and Donner. He also suffered from diarrhea upon his return from visits with them. The evidence also showed that appellant intended to continue to live with Donner; that Donner had gone to only three counseling sessions with Phillips and absolutely refused to attend sessions with Dr. White after Phillips' resignation. In sum, the evidence fully supported the finding of the court that "[t]his action has been pending since September 26, 1977, and little or no progress or prospects for progress has been shown by the Parents to provide the Children with parental care and protection . . . ." The court then ordered termination of appellant's parental rights in all three boys, which was affirmed on appeal by the District Court. We emphatically affirm.

It would seem that the above narrative would dispose of appellant's contention on appeal that she was not given a reasonable opportunity to rehabilitate herself. However, even if it does not, it is not the law in this state, as appellant would have us decide, that "parental rights may not be terminated unless the parent is given a reasonable opportunity to rehabilitate himself." Neb. Rev. Stat. § 43-209 (Reissue 1978) sets out six independent conditions, any one of which existing alone will justify termination of parental rights. Subsection (6), upon which appellant relies, sets out one of these conditions: "Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination." This does not mean that the parent must be given an opportunity to rehabilitate himself or herself even though one of the other five conditions set out in § 43-209 exists. It simply means that if the court has, in its discretion, ordered the parent to make reasonable efforts to

rehabilitate, failure of those efforts is another independent reason justifying termination of parental rights. This is what is meant by the case of *State v. Chant*, 202 Neb. 750, 277 N.W.2d 97 (1979), which appellant erroneously cites as authority for her claim that she is entitled to a reasonable opportunity to rehabilitate herself. That she is not so entitled is clearly expressed in *In re Interest of Carlson*, 207 Neb. 540, 543, 299 N.W.2d 760, 762 (1980), where this court held that: "There is no requirement that the court must implement a rehabilitation plan for the parent of a child found to be dependent and neglected . . . ."

Furthermore, it is abundantly clear from the record in this case that no opportunity to rehabilitate will ever be reasonable if the opportunities given appellant here were not. She was allowed to maintain custody of her children in the face of convincing evidence that she and Donner abused them. When the children were finally placed in foster care, appellant was still given more than a year thereafter to rehabilitate herself; and the record shows that every effort was made by appellant's counselors, the guardian ad litem, and even one of the foster mothers to assist appellant in overcoming her emotional problems and learning appropriate parenting techniques. Yet, the record also shows that the one who participated most reluctantly in these rehabilitation efforts was appellant herself, even though it was she who bore the responsibility to rehabilitate herself. *State v. Chant, supra.*

We cannot emphasize enough in cases such as these that "[t]he right of a parent to custody and control of his [or her] child is a natural, but not an inalienable, right. The public has a paramount interest in the protection of children from abuse and neglect." *In re Interest of Carlson, supra* at 543, 299 N.W.2d at 762. This public interest stems from the child's "right to grow up in a healthy and wholesome environment." *Id.* The larger issue in any case involving termina-

tion of parental rights is that right of the child identified in *Carlson*, and our duty to decide custody cases based on the best interests of the child requires that parental rights be subject to the rights of the child which make up its best interests. As we noted in *Meysenburg v. Meysenburg*, 208 Neb. 456, 458, 303 N.W.2d 783, 785 (1981): "It may very well be that the best interests of [the mother] would support a claim that the child be placed with her. . . . [H]owever, our principal concern is not the best interests of the mother but with the best interests of the child."

The three little boys involved here suffered physical, mental, and emotional abuse at the hands of appellant and Donner. The record demonstrates clearly that the developmental disabilities which prompted their placement in the Child Development Center have shown marked improvement since they were removed from appellant's custody. Although it was not required to do so, the court gave appellant more than reasonable opportunity to rehabilitate herself to the point where she could give her children proper parental care and supervision. After 2 years, she failed to do so, and the county court carried out its duty to the best interests of the children by terminating appellant's parental rights.

We note as well that the trial court found that termination of parental rights was justified under subsection (2) of § 43-209, finding specifically that "the Parents have substantially and continuously neglected the Children, and have refused to give the Children necessary parental care and protection." The evidence fully supports this finding, and the finding represents an independent justification for termination of appellant's parental rights in the three boys.

Appellant's final assignment of error concerns the trial court's denial of her application to have the court appoint a psychiatrist for her at the State's expense. This was a matter addressed to the sound discretion of the trial court, *State v. Suggett*, 200 Neb.

693, 264 N.W.2d 876 (1978), and will not be reversed on appeal absent abuse of discretion. The record demonstrates that, after the court's denial of her application, appellant hired a psychiatrist of her own accord but did not attempt to introduce into evidence the results of his examination either at the trial or on appeal. Further, appellant has not challenged the competence of Dr. Ernest Matuschka, the psychiatrist appointed by the court to evaluate her condition before the final dispositional hearing, nor did she present any evidence contradicting his evaluation. Thus, we find no abuse of discretion in the trial court's refusal to appoint a psychiatrist of appellant's choosing, and the assignment is without merit.

The decision of the county court terminating appellant's parental rights was correct in all respects, as was the order of the District Court affirming that decision. We therefore affirm the order of the District Court.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

SETTELL'S, INC., A CORPORATION, APPELLANT, V. PITNEY BOWES, INC., A CORPORATION, APPELLEE.

305 N.W.2d 896

Filed May 22, 1981. No. 43466.

1. **Directed Verdict.** A motion for a directed verdict should be sustained only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion.
2. **Uniform Commercial Code: Breach of Warranty: Proof.** A purchaser of goods under the Uniform Commercial Code claiming a breach of warranty must prove not only the warranty and the breach thereof; he must also prove the cause of the loss and the extent thereof.
3. **Uniform Commercial Code: Breach of Warranty: Damages.** The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as warranted.

4. **Damages: Proof.** Damages must be pled and proved, and the failure to offer proof on the issue of the value of goods as accepted will foreclose the method of determining damages from the court's consideration.
5. **Damages.** The trial court must refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine the issue without indulging in speculation and conjecture.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

J. L. Krause for appellant.

Nelson & Harding, Robert D. Kinsey, Jr., and Tim Engler for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and RICHLING, District Judge.

HASTINGS, J.

This is an action by Settell's, Inc., a small commercial printer, to recover from Pitney Bowes, Inc., a manufacturer and seller of large commercial printing equipment, damages suffered by the plaintiff in connection with the lease and sale of an automatic collator. Settell's claimed damages for breach of express and implied warranties under the Uniform Commercial Code. The case was tried to a jury, and at the close of all the evidence the trial court sustained the defendant's motion for a directed verdict and dismissed Settell's claim. Settell's appealed, assigning as error the directing of a verdict in favor of Pitney Bowes; the refusal to direct a verdict in favor of Settell's; and the refusal to grant a new trial. We affirm the District Court ruling.

In March of 1976 Robert Settell, the president of the plaintiff company, met with two representatives of Pitney Bowes regarding the possible acquisition of an automatic collator. Mr. Settell determined that the company could not afford to purchase the collator outright for $11,995, so a leasing arrangement was decided upon as the form of acquisition. Pitney Bowes arranged to sell the collator to NBC Leasing Company,

which would in turn lease the machine to Settell's for a 7-year period at a monthly rate of $256.99. Shortly after the agreement was signed, Pitney Bowes delivered and installed the collator and gave employees of Settell's instructions on the operation of the machine. Settell's testimony was that they had problems with the machine from the day it was delivered and they were never able to complete even one commercial job from March 10, 1976, to December 1977, when they finally gave up trying to use the collator after nearly 300 attempts. After each of these aborted attempts, the employees of Settell's collated the jobs manually.

After December of 1977 Settell's made written demand upon Pitney Bowes for removal of the machine, return of all money paid, and for satisfaction of the NBC lease. Pitney Bowes refused to do so. Settell's refused to make any further payments under the lease.

Thereafter, NBC Leasing brought suit against Settell's to recover under the lease. On the eve of the trial, that lawsuit was settled, with Settell's agreeing to pay to NBC Leasing $15,730.61, an amount only $202.77 less than would be paid if Settell's had completed the 7-year lease.

The instant case was a suit filed by Settell's against Pitney Bowes, seeking damages for a breach of warranty as well as for recovery of the amount expended in settlement of the NBC Leasing case. In sustaining defendant's motion for a directed verdict, the trial court made the following statement: "I think the damages are uncertain. I think the plaintiff has failed as a matter of law to introduce evidence in which the jury could establish damages without indulging in speculation and pure conjecture.

"As to their other allegations, it's not necessary to decide whether other points, whether there was sufficient evidence on the other points such as adequate notice and breach of warranty and so forth. So I don't

see any point in getting into that. I seriously question whether there was adequate notice given in the breach of warranty but I am not relying on that in sustaining this motion so all right, the motion of the defendant is sustained. The case is dismissed."

The rule regarding directed verdicts is well settled: "A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom." *Krug v. Laughlin*, 208 Neb. 367, 371, 303 N.W.2d 311, 313 (1981).

A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the verdict is sought, and that party is to be given the benefit of every inference which can reasonably be drawn. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

When the purchaser of goods under the Uniform Commercial Code claims a breach of warranty, he must not only prove the warranty and the breach thereof; in addition, "[t]he purchaser has the burden of proving both the cause of the loss and the extent thereof. § 2-715, U.C.C., comments 4 and 5. Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact, in this case the jury, to estimate with a reasonable degree of certainty and exactness the actual damages. [Citation omitted.] It is the duty of the District Court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture." *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 28-29, 237 N.W.2d 92, 97 (1975).

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as war-

ranted, unless special circumstances show damages of a different amount. Neb. U.C.C. § 2-714(2) (Reissue 1971). Further damages may be recovered under § 2-715 as incidental and consequential damages.

"In fixing the value of property if it were as warranted, as an element of the measure of damages, the purchase price has been said to be strong but not conclusive, the best, prima facie, strong prima facie, or, in the absence of other evidence, sufficient evidence of such value." 77 C.J.S. *Sales* § 367 at 1305 (1952); *Thompson Chrysler-Plymouth, Inc. v. Myers*, 48 Ala. App. 350, 264 So. 2d 893 (1972).

Damages are fixed by a comparison of the value of goods as warranted to the value of the goods as accepted, i.e., in their defective condition. Although the plaintiff presented evidence of the purchase price of the collator, it presented not even a scintilla of evidence of the value of the collator in the condition accepted.

"Although the ordinary measure, as provided in subsection (2) is usually the keystone for computing buyer's damages, *Valley Diecast Corp. v. A.C.W., Inc.*, 25 Mich. App. 321, 181 N.W.2d 303 (1970), *plaintiff has foreclosed this measure from the court's consideration by failing to either allege or offer proof on the issue of the 'value of the goods accepted,' i.e., in their defective state.* Damages, like any other element of plaintiff's cause of action, must be pled and proved, and the burden is on plaintiff to offer evidence of difference in value, if the judgment is to be based on that measure. *Neuman v. Spector Wrecking & Salvage*, 490 S.W.2d 875 (Tex. Civ. App. 1973); *Dolomite Limestone Products v. Kennedy Von Saun Manufacturing & Engineering Corp.*, 241 Mich. 279, 217 N.W. 26 (1928). In the absence of evidence demonstrating the amount of damages suffered, a buyer is not entitled to recover from seller for breach of warranty. *Opheim v. United Mobile Homes*, 511 P.2d 1289 (Wyo. 1973).

"Subsection (1) of 2-714, notably, provides an alternate rule allowing the computation of buyer's loss

'in any manner which is reasonable.' Thus, e.g., if the goods can be made to conform to the warranty by a reasonable expenditure, the cost of such expenditures may be the measure of damages for the breach. *Council Bros., Inc. v. Ray Burner Co.*, 473 F.2d 400 (CA 5 1973); *Meyers v. Antone*, 227 A.2d 56 (D.C. App. 1967). *Plaintiff, however, has offered no evidence of what such expenditures might amount to even though both plaintiff's experts appeared fully capable of offering such opinions based on their examinations of the H-100's defects." Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 382-83 (E.D. Mich. 1977).

Similarly, the plaintiff in the case at bar had foreclosed both methods of measuring damages from the jury as well as from this court on appeal.

The only alternative might be to assume that the value of the machine was zero. Under the right circumstances that might be a good and valid assumption, as the court held in *Swenson v. Chevron Chemical Co.*, 89 S.D. 497, 506, 234 N.W.2d 38, 44 (1975): "If the insecticide had been as warranted, it would apparently have been worth $717. In its defective condition it cost Plaintiff a considerable sum and must for practical purposes have been deemed by the jury to have been worth nothing. This conclusion is not unreasonable under the circumstances." However, a look at the record in the instant case reveals that the machine would probably have at least salvage value, if not be very valuable given the proper repairs and maintenance. A conclusion that the machine is worthless in these circumstances would not be reasonable.

Even though the plaintiff has not proven general damages under § 2-714, it still may recover damages under § 2-715 as incidental and consequential damages. In *Addressograph-Multigraph v. Zink*, 273 Md. 277, 329 A.2d 28 (1974), the court stated that although the buyer could have recovered damages under § 2-714, he for some reason sued only for consequential

damages. This did not preclude him from recovering the lesser sum.

The plaintiff attempted to prove consequential damages by submitting evidence of the amount of time spent on each collating job, the value of both employee and managerial time spent on each job, and the amount of attorney fees incurred by Settell's in its litigation of the dispute with NBC Leasing Company. However, as the defendant points out, there is no proof of what the job would have cost if the collator had been used, so there is no way to compare what the increase in costs was. Neither does the plaintiff prove, in any concrete manner, what he may have made in further profits. After objections to the evidence were sustained, Settell's made an offer of proof that the amount of attorney fees incurred by it in the earlier litigation was $6,142.80. No attempt was made to prove that this sum was fair and reasonable, and the evidence was properly excluded.

There simply appears to be a total failure of proof of damages. The reason for this does not appear to be for lack of damages, but more for lack of proof of them at trial.

The plaintiff's attorney had given the trial court no choice but to direct a verdict for the defendant, by a complete failure to prove his client's case. We similarly have no choice but to affirm that ruling.

AFFIRMED.

IN RE INTEREST OF MICHAEL LEE WAGNER, ANN SHERRY RUSSELL, JACK EDWARD RUSSELL, JR., AND MELVIN RAY RUSSELL, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. KAREN RUSSELL, NATURAL MOTHER, JACK E. RUSSELL, SR., NATURAL FATHER, AND KEITH CAVES, NATURAL FATHER, APPELLANTS.

305 N.W.2d 900

Filed May 22, 1981. No. 43616.

1. **Juvenile Courts: Parental Rights.** Where the juvenile court has made a finding of neglect under Neb. Rev. Stat. § 43-209(2) (Reissue 1978), it need not afford the parent opportunity to correct the conditions underlying the finding before terminating parental rights.
2. **Parental Rights.** Although a parent's parental rights should not be terminated for the sole reason of conviction of crime and incarceration, the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated.
3. **Child Custody: Parental Rights: Appeal and Error.** In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Thomas R. Wolff for appellants Russell.

Frederick D. Stehlik of Daub, Stehlik & Smith for appellant Caves.

Donald L. Knowles, Douglas County Attorney, and Christopher E. Kelly for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an appeal from a judgment of the separate juvenile court of Douglas County, terminating the parental rights of Karen Russell and Jack E. Russell, Sr., husband and wife, and of Keith Caves. Four children

are involved: Michael Lee Wagner, Ann Sherry Russell, Jack Edward Russell, Jr., and Melvin Ray Russell. At the time the petition was filed on September 29, 1978, Michael was 4 years 6 months of age; Ann Sherry, 1 year 6 months; and Jack and Melvin, twins, were 4 months of age.

Karen is the mother of all four children. Jack is the father of Ann Sherry and the twins. Michael was born when Karen was 15 years of age and before her marriage to Jack. Keith Caves is the natural father of Michael Wagner.

The petition alleged that Karen and Jack were, through no fault of their own, unable to assume care, custody, and control of the children and that the children were without proper support under the provisions of Neb. Rev. Stat. § 43-202(1) (Reissue 1978). It further alleged that, by reason of certain specifically described acts or omissions of the parents, the children lacked proper parental care by reason of the faults or habits of the parents, all under the provisions of § 43-202(2).

As to Keith Caves, the petition alleged that Michael was homeless or destitute, or without proper support.

On October 2, 1978, the county attorney filed a motion for temporary custody, and on October 2, 1978, the court took custody and entered an order placing the possession of the children in the Douglas County Social Services for temporary placement in a foster home. Attorneys were appointed for all parties and hearings were held on October 16, 1978, January 30, 1979, April 11, 1979, September 7, 1979, April 8, 1980, May 13, 1980, and July 9, 1980.

On February 14, 1980, a motion for termination of parental rights was filed, which alleged, among other particulars, that Karen and Jack had failed to cooperate in a rehabilitation plan and that Caves was unable to provide habitation and support for Michael because he was then incarcerated in the Nebraska Penal and Correctional Complex for a term of several years.

Caves, pursuant to an order of the court, made ap-

pearances at the hearings of January 30, 1979, and April 8, 1980, and testified at the latter hearing. He also filed a resistance to the motion for termination.

On June 10, 1980, the court entered an order finding certain specific allegations of the petition to be true; that it was in the best interests of the children that parental rights be terminated; and that the children remain in the custody of the State of Nebraska, Department of Welfare (custody had been placed by a prior order), for adoptive purposes.

The Russells and Caves have separately appealed to this court.

Caves makes the following assignments of error: (1) The evidence does not show that he substantially, continuously, and repeatedly neglected his child and refused to give the child necessary parental care and protection. (2) The court erred in not directing and supervising for him a plan of rehabilitation as a parent. (3) The court erred in terminating his parental rights on the sole ground of his incarceration in the Nebraska Penal and Correctional Complex.

The sole assignment of error made by the Russells is that there exists in the record no clear and convincing evidence that they substantially or repeatedly neglected the children and refused to give the children necessary parental care and protection as required by Neb. Rev. Stat. § 43-209(2) (Reissue 1978).

We affirm.

With reference to Caves, the evidence is as follows. He admits paternity of Michael. However, the record does not show that he has acknowledged paternity in the form provided by statute, nor has there been any adjudication of the fact of paternity. No orders for support have ever been entered.

When Caves appeared before the court on January 30, 1979, he was 21 years of age. His exact date of birth is not shown. Michael was born in March of 1974. This would indicate that the child was conceived in June or July of 1973, at which time Caves was about 15 years of

age. Karen testified that Michael was conceived as a consequence of her being raped by Caves, but she gave no details or corroboration of this testimony other than what may be implied from Caves' testimony that he neither lived with nor dated Karen. He made no direct denial of the claim of rape and no inquiry was made of him on that point.

Caves began serving a 6- to 10-year term in the Nebraska Penal and Correctional Complex in April of 1977. During the approximately 3-year period after Michael's birth and before Caves' incarceration, he did not support the child, although he visited the baby on seven or eight occasions, and on one occasion, the first Christmas following his birth, made a gift of clothing. Karen testified that she did not want Caves' help and apparently detested him because of the manner in which she claims the child was conceived.

Caves' first visits with the child were made with Karen's consent, but later visits were made over her objection and without her knowledge through the cooperation of relatives of both Karen and Caves. Apparently the families were acquainted and lived in the same neighborhood.

The foregoing evidence, including Caves' incarceration, is sufficient to show that Caves neglected to and was incapable of carrying out his parental responsibilities during the 3 years previous to his incarceration. The fact of his later incarceration made it impossible for the court to direct and supervise a plan of "rehabilitating" Caves as a parent, even if it were required by law to do so. Where the juvenile court has made a finding of neglect under § 43-209(2), it need not afford the parent opportunity to correct the conditions underlying the finding before terminating parental rights. *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979). Although a parent's parental rights should not be terminated for the sole reason of conviction of crime and incarceration, the fact of incarceration may be considered along with other factors in determining

whether parental rights should be terminated. *In re Sego*, 7 Wash. App. 457, 499 P.2d 881 (1972); *In re Welfare of Staat*, 287 Minn. 501, 178 N.W.2d 709 (1970).

Caves did not fulfill his parental responsibilities of support and maintenance. The familial relationship between him and Michael was almost totally absent. We say, in passing, that we have not purported to make any determination as to whether Michael was conceived as a consequence of a rape, and, hence, that factor is not considered in our conclusion. The best interests of the child require that the parental rights of Caves be terminated. See *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981).

The child Michael apparently was in Karen's custody or that of Karen's mother until Karen's marriage to Jack, at which time Michael was about 2½ years old. He thereafter lived with Karen and Jack.

The evidence presented at the various hearings, if believed by the court, would permit it to find, by clear and convincing evidence, the following facts. The situation of Michael and the three Russell children first came to the attention of the Douglas County Child Protective Services in about May of 1978 as the result of a referral made by a nurse employed by a hospital in which Karen was a patient and from which she signed out against medical advice. This was at about the time of the birth of the twins. As a consequence of the referral, an investigation of the circumstances of the four children was made by a Child Protective Services social worker and a visiting nurse. Their testimony indicated that the children were not being properly fed and cared for and were being subjected to extremely unsanitary conditions hazardous to their health. It further indicated that Karen lacked the requisite knowledge and motivation to care for the children in a reasonably proper manner. The twins, apparently, were not growing at normal rates. The Child Protective Services arranged to have the twins examined at a clinic. It also arranged to have all the children cared for at a day-care center

while Karen worked or sought employment. Karen brought the children in the morning and picked them up in the evening. This type of care continued during a period of several months. During the entire period of time, the children arrived at the center unclean and always hungry. They had to be bathed by the center's staff as well as fed. Karen frequently failed to furnish sufficient formula for the twins, although it was available to her through Medicaid. One of the twins developed the disease called thrush. Karen was instructed by the visiting nurse to sanitize bottles and not interchange them between the twins. She failed to do so and the other twin caught the disease. Karen failed to secure refills of medication prescribed for the disease and the visiting nurse had to procure and deliver the medicine to the day-care center. During all this time, the visiting nurse conferred weekly or more frequently with Karen, offered advice, and gave training which went unheeded.

During the above period of time and thereafter until 1979, the family did not, except for a brief period, have a residence of its own. They moved from relative to relative and had about 10 different addresses from 1978 until the motion to terminate was filed in 1980. On August 22, 1978, the visiting nurse received a call from Jack's sister asking her to obtain formula for the twins. Shortly thereafter the visiting nurse received a call from Jack's mother indicating that Melvin was having difficulty in breathing. During the foregoing period the parents failed to keep some of the medical appointments that had been arranged for the children. Upon receiving the call, the nurse went to the day-care center, examined the child, and while she was there the child's breathing was interrupted. The doctor who had been seeing the children recommended immediate hospitalization of all the children and they were taken by ambulance to the hospital.

During this period, Jack and Karen were having marital difficulties and living apart part of the time,

and a divorce was pending. After the children were placed in the hospital, these proceedings were filed in the juvenile court and, after hearing, the court directed the children be placed in foster care. They remained in foster care from September 1978 until the order of termination was entered on June 10, 1980.

The evidence also indicated that Jack changed employment frequently, apparently on some occasions without cause. He also served a jail sentence for some offense during that period of time. Karen had been arrested for burglary and was likewise incarcerated for a short period during the same time Jack was in jail. During the time of common incarceration, the children were in the care of Jack's mother, the person who had informed the visiting nurse of the breathing problems of one of the twins.

The evidence also indicated that the parents used ADC money for purposes of bail and for the purchase of an automobile, when necessary transportation services would have been furnished by the Child Protective Services.

In order to assist Jack and Karen in becoming better parents, the court, on September 10, 1979, approved and ordered the implementation of a plan. This plan included, among other things, that Karen and Jack submit to psychological and psychiatric testing; pay $40 per month toward the support of the children while in foster care; attend training sessions designed to develop the knowledge, skills, and motivation required to carry out the obligations of parents to a reasonable degree; procure and maintain clean and adequate housing for the family; and Jack maintain employment.

On February 14, 1980, the county attorney filed the motion for termination of parental rights.

Either by stipulation or the introduction of evidence, the following facts were established. Jack and Karen completed the psychological testing and Karen completed the psychiatric testing. They made no financial contribution to the support of the children while they

were in foster care. Karen attended 8 of 23 parental sessions; Jack attended 6 of 15 such sessions. Karen regularly visited with the children; Jack did not visit the children after September 1979.

The evidence rather clearly indicated that Jack and Karen did not take seriously the possibility of losing their children until the motion for termination was filed. The psychological testing indicated that the parents had sufficient mental capability to carry out their parental obligations had they the proper motivation. It indicated, however, that they would have difficulty in maintaining regular employment.

Karen testified that the housing they proposed to use, furnished by her mother, had adequate space for only two children. The mother testified that they could have the housing "if they can keep it up."

Jack testified, when asked what his desires were with reference to the children: "A. Well, it's kind of hard to say, but I would just as soon have two because if you give us all four you are going to end up taking them because we couldn't financially support four kids. Q. Do you want the two children back? A. The two oldest ones, yes." He further testified: "I don't want them to terminate any rights, but I mean, if you are going to look at it realistically there's no way we can support four kids."

The evidence shows that all four children made great progress in health and mental growth while under foster care and their appearance and manner make them quite lovable.

While, to some extent, the court's findings are based upon somewhat conflicting evidence, we, on review de novo, take into consideration the fact that the trial judge observed the witnesses and is in a much better position than this court to draw conclusions concerning the capabilities and intentions of the parents.

The evidence was sufficient to establish clearly and convincingly that the parents had substantially and continuously neglected and refused to provide neces-

sary parental care and protection for the children, and that the best interests of the children would be served by terminating the parental relationship. *State v. Chant*, 202 Neb. 750, 277 N.W.2d 97 (1979).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY D. EBBERSON, APPELLANT.

305 N.W.2d 904

Filed May 22, 1981. No. 43684.

1. **Investigative Stops.** A police officer may in appropriate circumstances and in a proper manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.
2. ____. The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal activity has occurred or is occurring and that the suspect may be involved.
3. ____. An investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

James S. Jansen for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant was found guilty by a jury of robbery and use of a firearm in the commission of a felony. He was sentenced to 10 to 15 years' imprisonment on the robbery count and 5 to 10 years' imprisonment on the

firearm count, the sentences to be served consecutively.

On the morning of February 1, 1980, at approximately 12:40 a.m., two black males entered a Kwik Shop at 50th and Grover Streets in Omaha, Nebraska. One of the men pointed a shotgun at an employee and ordered him to open the cash register. The man carrying the gun was described by the employee as about 5 feet tall, wearing a green jacket, black gloves, and a hat. The other man was described as approximately 5 feet 6 inches tall, also wearing a hat. The taller of the two men emptied the cash register. The gunman then ordered the employee to open the safe and the tall man took the contents of the safe, which included a green moneybag with a lock, a blue moneybag, and some rolls of change. The robbers left the store and ran north. The employee immediately called the police.

At approximately the same time two police officers in a cruiser were just leaving Interstate 80 at the 42nd Street exit. At that point Interstate 80 runs generally east and west. Grover Street is also an east-west street, a very short distance to the north of Interstate 80 in that area. The officers received a broadcast over police radio that a robbery had just occurred at the Kwik Shop at 50th and Grover Streets. The broadcast described the robbers as two small black males armed with a shotgun. The officers immediately drove north on 42nd Street to the intersection of 42nd and Grover Streets, which was 8 blocks east of the Kwik Shop, and parked their cruiser in a lot on the northwest corner of that intersection. Forty-second Street is the first north-south arterial street east of 50th Street which has an entrance to Interstate 80.

Within a minute after the officers parked the cruiser, they observed an automobile approaching the intersection from the west on Grover Street. The car stopped at the traffic signal at the intersection of 42nd and Grover Streets. The car was under a street light approximately 30 feet from the officers. The windows of the car were steamed up, except that the driver's window was rolled

down and the passenger window in the front seat was covered by a plastic trash bag. The officers observed two black males in the front seat of the automobile and the driver appeared to be short. The car turned north on 42nd Street and the officers followed it and stopped the car.

The officers asked the driver to produce his driver's license and registration. One of the officers noticed a movement in the rear seat, turned on his flashlight, and observed two individuals and a green coat which was bundled up on the back seat. He returned to the cruiser to request more information over the radio as to the description of the suspects, and was advised that one of the suspects had been wearing a khaki or green-colored jacket and black gloves. With this information the officers asked the occupants to get out of the car. Another police officer had arrived on the scene by that time and the officers found a green army field jacket and a pair of black gloves on the back seat. They also found a shotgun, a green and a blue moneybag, and some rolls of change on the floor. The defendant and the other suspects were placed under arrest. The evidence at trial established that the amount taken in the robbery was approximately $1,300 and the amount seized from the car was almost exactly the same amount.

The employee of the Kwik Shop was unable to identify the defendant at trial, but one of the other suspects testified as a witness for the State and testified that he and the defendant were the two robbers.

The jury found the defendant guilty on both counts and he was sentenced to 10 to 15 years' imprisonment for robbery and 5 to 10 years' imprisonment for use of a firearm in the commission of a felony, the sentences to be served consecutively.

The defendant's principal contention on appeal is that the District Court erred in failing to sustain the defendant's motion to suppress the physical evidence obtained from the automobile. The defendant asserts that the police officers had no adequate cause to make

the initial investigative stop of the automobile. The argument is that because there was no evidence that the automobile was violating any traffic regulations, there was, therefore, no objective manifestation that the defendant had been engaged in any criminal activity and the investigative stop of the automobile was unjustified. The assignment of error is predicated on the investigative stop and not on the search.

Police officers have statutory authority to "stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime . . . ." Neb. Rev. Stat. § 29-829 (Reissue 1979).

This court has essentially interpreted the scope of the statute to be coextensive with the requirements of the fourth amendment. In *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979), we held that a police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.

The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal activity has occurred or is occurring and that the suspect may be involved. See *State v. Anderson*, 204 Neb. 186, 281 N.W.2d 743 (1979).

The U.S. Supreme Court has addressed the standards that must be met in an investigatory stop to satisfy the requirements of the fourth amendment in *United States v. Cortez*, ___ U.S. ___, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). The Court held that an investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account.

Police officers must have a particularized and objec-

tive basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior. See, *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

In the case at bar, the armed robbery was reported to the police immediately after it occurred and the police officers involved were only a short distance away on the first major north-south arterial east of the robbery scene. Their observation point was 8 blocks from the robbery scene and they knew that Grover Street was one of the few thoroughfares to the east from the robbery site. At that time of night there was little traffic on Grover Street. The automobile approached from the direction of the robbery site within minutes after the robbery, and there were two black males in the front seat and the driver appeared to be short. In the totality of the circumstances these experienced police officers knew that criminal activity had occurred and had a reasonable suspicion, founded upon articulable facts, to conclude that the persons in the automobile might be involved in that activity. The District Court, at the hearing on the motion to suppress, reached that conclusion on the facts and that determination was not clearly erroneous.

The defendant also contends that the trial court erred in overruling defendant's motion for a mistrial. During cross-examination of the employee of the Kwik Shop, the defendant's counsel asked him whether or not one of the investigating officers had been in the store and chatted with the employee about the case. The employee responded: "No. He just said that they got a really good case against them."

An objection was interposed and a motion for mistrial

was made. The objection was sustained and the jury was instructed to disregard the answer given, and the motion for mistrial was overruled. The answer was invited by defendant's counsel, and even if it had been wholly unresponsive it was clearly not so prejudicial as to require a new trial. Ordinarily, when an objection to improper evidence is sustained and the jury is instructed to disregard it, such an instruction is deemed sufficient to prevent prejudice. See *State v. Dittrich*, 191 Neb. 475, 215 N.W.2d 637 (1974).

Defendant's remaining assignments of error are without merit.

AFFIRMED.

DONALD MOSS AND BETTY MOSS, APPELLEES, V. LAMOINE SPECK, DOING BUSINESS AS LAMOINE SPECK CONSTRUCTION CO., APPELLANT.

306 N.W.2d 156

Filed May 29, 1981. No. 43241.

1. **Contracts: Damages.** Where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects.
2. ____: ____. Where the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract.
3. **Judgments: Appeal and Error.** The judgment of the trial court in a law action where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong.

Appeal from the District Court for Hall County: BERNARD SPRAGUE, Judge. Affirmed.

Paine & Huston for appellant.

W. G. Blackburn of Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley for appellees.

Heard before KRIVOSHA, C.J., WHITE, AND HASTINGS, JJ., and HENDRIX and KNAPP, District Judges.

KNAPP, District Judge.

This is an action at law brought by Donald Moss and Betty Moss, husband and wife, against LaMoine Speck, doing business as LaMoine Speck Construction Co., alleging breach of warranties contained in the parties' written contract for the construction by defendant of a residence for plaintiffs.

Construction was completed, or nearly so, in early October 1976. Plaintiffs moved into the residence a few days later, although a required "occupancy permit" allowing them to do so had not yet been obtained from the city building inspector. On March 19, 1977, following a 10-inch snowfall, the roof of the residence "sagged" to such a degree that the city building inspector refused to issue the occupancy permit.

That official, together with a private engineer retained by plaintiffs, inspected the roof and suggested certain repairs thereto which were attempted by defendant, but to little avail. Thereafter, plaintiffs' engineer reinspected the roof and concluded that the original defects in construction had been compounded rather than cured by the attempted repairs and that replacement of the roof was required. Plaintiffs thereupon hired a second contractor who reconstructed the roof at a cost to plaintiffs of $20,207.80.

This action followed, plaintiffs alleging that defendant breached the contract by failing to construct the residence in a "workmanlike manner according to standard practices," and by failing to construct the residence so that it would be suitable for residential purposes and would comply with all applicable building codes.

The case was tried to the court, sitting without a jury. On the trial, defendant conceded that various substantial errors occurred in his construction of the

roof. Plaintiffs prayed for the amount they paid the second contractor, less certain credits admittedly due defendant. No evidence as to the value of the residence as constructed by defendant compared to its value if constructed in accord with the contract was offered by either party. The court entered judgment in favor of plaintiff in the sum of $16,934.60, that being the amount paid by plaintiffs to the second contractor less $3,273.20 plaintiffs conceded was due defendant for work done outside the terms of the contract.

On appeal, defendant concedes liability and questions only the measure of damages applied by the trial court, citing *A R L Corp. v. Hroch*, 201 Neb. 422, 268 N.W.2d 101 (1978), as the latest in a series of Nebraska cases reciting the rule that where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects, but where the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. The latter rule contemplates instances where the contract has been substantially complied with, the structure as completed will serve substantially as well as would the structure if completed according to contract, and completion in accord with the contract terms would either endanger the balance of the structure or be possible only at inordinate cost. 5 A. Corbin, Contracts § 1089 (1964). In the instant case the structure as completed could not qualify for an occupancy permit and was therefore totally without value for the purpose for which it was intended, replacement of the roof presented no danger to the balance of the structure, and there is no evidence that the cost was unreasonable or inordinate. "Without question, the contract breaker should pay the cost

of construction and completion in accordance with his contract unless he proves affirmatively and convincingly that such construction and completion would involve an unreasonable economic waste." 5 A. Corbin, *supra* at 488.

The judgment of the trial court in a law action where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong. *Tibbs v. Fisher*, 208 Neb. 306, 303 N.W.2d 293 (1981).

The proper measure of damages under the evidence in this case is a question for the trier of fact. The trial court, the trier of fact, found the proper measure of damages to be the cost of remedying the defect. That finding cannot be said to be clearly wrong.

AFFIRMED.

McDONALD'S CORPORATION, A DELAWARE CORPORATION, APPELLANT, V. MARKIM, INC., A NEBRASKA CORPORATION, APPELLEE. McDONALD'S CORPORATION, A DELAWARE CORPORATION, APPELLANT, V. ROSELI, INC., A NEBRASKA CORPORATION, APPELLEE.

306 N.W.2d 158

Filed May 29, 1981. No. 43287.

1. **Equity: Appeal and Error.** On appeal of an equity action, our review is de novo.
2. **Contracts.** Absent contrary statutory provisions, manufacturers are free to enter into franchise agreements for the distribution of their products as they see fit.
3. ____. Generally, any person may do business with whomsoever he desires. Also, he may refuse business relations with any person whomsoever, whether the refusal is based on reason, whim, or prejudice.
4. ____. A contract which provides that an existing franchise holder must be given first consideration for an extension or renewal of the term does not mean that such franchisee must be given thoughtful or sympathetic regard in preference to anyone else, but only that the franchisee's qualifications be examined first and that a decision by the franchisor regarding the granting or denying of such extension must be actually

and honestly exercised. Such decision must be made with entire good faith and not captiously or capriciously.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

Maureen E. McGrath of Kutak, Rock & Huie and Burton Cohen and Ira Feldman for appellant.

Frederick S. Cassman of Abrahams, Kaslow & Cassman for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

McDonald's Corporation filed these actions, which have been consolidated on appeal, seeking a declaratory judgment by the District Court for Douglas County of its obligations under franchise agreements with Markim, Inc., and Roseli, Inc. McDonald's also sought an injunction barring Markim and Roseli from using its trademarks, trade names, and service marks after the expiration date of their agreements. Markim and Roseli counterclaimed, alleging that McDonald's had acted in bad faith and had violated the Nebraska Franchise Practices Act by failing to renew their expiring franchises without good cause. The trial court determined that the Nebraska Franchise Practices Act was inapplicable retroactively; however, it did find that McDonald's had acted in bad faith, and therefore entered a mandatory injunction requiring McDonald's to extend each of the expiring franchise agreements for a period of 5 years.

McDonald's appealed from the adverse rulings and assigned the following as error: (1) The court erred in finding that McDonald's acted wrongfully in exercising its discretion and acted in bad faith; (2) The court erred in holding that McDonald's did not fulfill its obligation to give appellees "first consideration" to an "additional franchise period" when it decided

that it did not want to have any further franchise relation with them; and (3) The court erred in not enjoining appellees from using McDonald's trademarks, trade names, and service marks after the agreed expiration dates of their franchises. We reverse.

Markim and Roseli are corporations whose principal business is the operation of McDonald's restaurants as franchisees in the national system of fast-food hamburger restaurants. Some background is necessary to understand the ownership of the franchise rights. During the period from 1959 to 1964, when McDonald's was still in its infant stages, Bernard Copeland and John Skoog acquired a total of six McDonald's franchises in the Omaha-Council Bluffs area. In each instance, McDonald's granted a franchise and entered into a sublease of the premises for a term of 20 years. The first franchise was entered into in 1959 for the location at 8022 West Dodge Road, and the second franchise was entered into in 1961 for the location at 4802 Ames Street. Late in 1964, Eli I. Schupack and Julian J. Wineberg, who were partners in a Chicago accounting firm, on behalf of themselves and other investors, purchased the six franchises from Copeland and Skoog. McDonald's consented to the assignment of the franchises and subleases upon the express condition that Schupack and Wineberg continue to retain ownership of 51 percent of the stock of the corporations holding the franchises, and that one of the men move to Omaha and devote substantially all of his time to the active management of the six McDonald's restaurants. Eli Schupack moved to Omaha and has managed the six restaurants since the acquisition. The investors acquired a seventh restaurant in 1971 with a 20-year franchise term, which Schupack also manages.

Each restaurant is owned by a different corporation of which Schupack and Wineberg own 51 percent. The appellee Markim, Inc., is the owner of the Dodge Street

restaurant, and appellee Roseli, Inc., owns the Ames Street restaurant. The original 20-year term of the Dodge Street franchise expired on February 8, 1980, and the Ames Street franchise is to expire on December 12, 1981. Pursuant to company policy to meet in the 17th year of a 20-year franchise to determine whether the franchisee will have his franchise renewed, the McDonald's rewrite committee met on August 23, 1977, to discuss the Ames Street and Dodge Street restaurants. At the conclusion of the discussion, the committee voted unanimously not to grant any additional franchise periods to appellees after the current franchise periods expire. Markim and Roseli were notified of this action by letters dated March 6, 1978, and May 8, 1979, respectively.

Subsequent to notification of the denial of the franchise renewal, it appears that appellees contended that their agreements contained a renewal option. That claim was later dropped. However, McDonald's commenced these actions, seeking a declaratory judgment that it had fully complied with its franchise agreement to give appellees first consideration for renewal and that it was not obligated to offer appellees an additional franchise period. The clause in the franchise agreement which is in issue stated:

"20. This agreement and said franchise and license granted hereunder, unless theretofore terminated, shall be and remain in full force and effect for a period of twenty (20) years from and after the first day of the month following the month during which the said establishment shall have been constructed and equipped as hereinbefore provided. *If at the end of the franchise term of twenty years the premises are available and Licensee is determined in good standing by Licensor, Licensee will be given first consideration for an additional franchise period of five years,* consistent with Licensor's rights and interests in the property." (Emphasis supplied.)

Prior to trial, McDonald's filed a motion for partial

summary judgment which the trial court sustained, and from which no appeal has been taken. In that motion McDonald's asked the court to decide the issues of (a) the meaning of paragraph 20 and the nature of the rights and obligations it created, and (b) the applicability of the Nebraska Franchise Practices Act, Neb. Rev. Stat. §§ 87-401 et seq. (Cum. Supp. 1980), effective July 22, 1978. The court held that there were no genuine issues of material fact involved in those two issues, and that McDonald's was entitled to judgment as a matter of law. The court found that the Nebraska Franchise Practices Act was not intended to apply retroactively and therefore the statutes were not applicable to the franchises involved in this lawsuit, and that McDonald's was not subject to nor in violation of the act. The court further found that the "first consideration" clause of paragraph 20 is clear and unambiguous and does not grant an option to the defendants for an extended 5-year term, nor does it obligate McDonald's to extend the franchise for an additional 5 years. However, according to the trial court's orders, the clause does require McDonald's to review and reflect upon the facts concerning the defendants' qualifications and capabilities as franchisees before considering anyone else for the franchise at the particular locations. The clause did not, in the trial court's opinion, impose any obligation on McDonald's to exercise its discretion in favor of extending defendants' franchises even if the relevant facts disclose that defendants are qualified for an additional 5-year term. In other words, once McDonald's complied with the obligation to give first consideration to the defendants, McDonald's could consider anyone else for the subsequent franchise should McDonald's desire to continue doing business at those locations. Such findings appear in the court's two orders, and are conclusive as to the parties.

After the case was tried to the court, it entered a decree reaffirming and incorporating its partial sum-

mary judgment findings and conclusions. The decree stated: "22. The Court finds that McDonald's, in each instance, failed to give Markim or Roseli 'first consideration' within the meaning of Paragraph 20, since 'first consideration' implies that such consideration will be given in a reasonable manner and based upon good faith and the requirements of reasonableness and good faith consideration were not afforded by McDonald's to the defendants." The court found that evidence establishing lack of good faith was based in part on litigation pending between McDonald's and defendants which was on appeal to this court from an adverse decision, and from which management must have harbored some resentment and dissatisfaction with Eli Schupack for the filing of the suit (see *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978)); emphasis that was placed on Schupack's failure to donate to a voluntary advertising fund; letters of refusal to renew that were sent at unreasonable and unconscionable lengths of time subsequent to the decision of the committee; the management of McDonald's that misled defendants by encouraging franchisees to speak up with regard to complaints and assured them that no recrimination would result; and the overall testimony of management that was based on subjective reasoning on the part of witnesses for McDonald's with little or no justification for the conclusions reached by those witnesses that the disharmony between Schupack and McDonald's was caused solely by Schupack's actions.

The court then ordered that each of the franchises be extended an additional 5 years under the terms of the original franchise agreement. On appeal, McDonald's assigns as error that the trial court erred in finding, as a matter of fact, that McDonald's acted in bad faith. Appellant argues that the court erroneously equated "good faith" with "good cause," and thereafter applied an improper standard of good faith. The question on appeal is what the proper standard

is and whether McDonald's applied that standard when it refused to renew the franchises. This being an equity action, our review is de novo. *Botsch v. Leigh Land Co.*, 205 Neb. 401, 288 N.W.2d 31 (1980).

The position taken by appellees is that the Nebraska Franchise Practices Act is not applicable, but it did establish the public policy of the state, and therefore this court should, as a matter of common law, require a showing of good cause before a franchise can be terminated or not renewed. To adopt such a position would in substance retrospectively apply the act, and we decline to do so. An indication of what is the common law relating to franchisors and franchisees can be gleaned from *United States Brewers' Assn., Inc. v. State*, 192 Neb. 328, 220 N.W.2d 544 (1974). In that case, actions were brought to determine the constitutionality of Neb. Laws 1971, L.B. 234, as amended by Neb. Laws 1972, L.B. 66. L.B. 234 related to the distribution of beer in the state, and L.B. 66 related to the distribution of alcoholic liquors in the state. The laws protected distributors against termination of their franchises without a showing by the manufacturer of good cause, and specified what shall not constitute good cause, as well as what shall be considered in determining whether good cause exists. This court determined that the act was an unreasonable invasion of the personal and property rights of the plaintiffs, and declared the laws unconstitutional.

"Prior to the enactment of L.B. 234 and L.B. 66, the manufacturers of beer and alcoholic liquors were free to enter into contracts with distributors concerning the distribution of their products as they saw fit. The plaintiffs had the same rights in this regard as the manufacturers of other products. See Barish v. Chrysler Corp., 141 Neb. 157, 3 N.W.2d 91." *United States Brewers' Assn.* at 330, 220 N.W.2d at 546.

Barish v. Chrysler Corporation, 141 Neb. 157, 3 N.W.2d 91 (1942), was an action to recover damages under the Junkin Act for injuries to business and

property which arose from termination of franchise contracts by defendants Chrysler Corporation and Dodge Brothers. The contracts contained express terms for termination. The syllabus to that case states: "Any person may do business with whomsoever he desires. Also, he may refuse business relations with any person whomsoever, whether the refusal is based on reason, whim or prejudice. And where, by the terms of a contract, it is specified that either party may terminate the agreement at any time, such termination may likewise be had as stipulated and upon the conditions in such contract contained." This appears to be a statement of the common law of Nebraska relating to franchise agreements prior to the enactment of the Nebraska Franchise Practices Act.

The only requirement of McDonald's was that it give the licensee "first consideration for an additional franchise period of five years." Strangely enough, there is a paucity of case law construing the term "first consideration." As a matter of fact, the only case found remotely bearing on this subject is one relating to a labor bargaining agreement. In *Utility Co-Workers Association v. Public Service Electric and Gas Company*, 344 F.2d 102 (3d Cir. 1965), the bargaining agreement between the parties provided that "'[w]hen a vacancy occurs . . . the Company agrees that it will extend to other stenographic employees in the Commercial Office first consideration for promotion to the secretarial position.'" In syllabus 1 of that opinion, it is stated in part that "'first consideration' for promotion to the secretarial position did not mean that employer was bound to give commercial office employee 'thoughtful or sympathetic regard' in preference to anyone else, and hence employer which examined commercial office employee's qualifications first properly selected another applicant to fill vacancy in office of confidential secretary." And from the body of the opinion: "What

the company was bound to do under Section 5 was to examine the Commercial Office employee's qualifications first, which it admittedly did." *Id.* at 103.

In the final analysis, the obligation to give a licensee "first consideration for an additional franchise period" places no burden of any significance upon McDonald's. The actions of McDonald's should be reviewed not in terms of whether it had good cause to refuse the franchise, but whether it complied with the contract provision dealing with termination and renewal.

The rule in this state is where a contract states that the opinion or decision of a designated person is to be conclusive, then all that is required is that the judgment be actually and honestly exercised. *Thurman v. City of Omaha*, 64 Neb. 490, 90 N.W. 253 (1902). Such a decision must be made with entire good faith and not captiously or capriciously. *Melson v. Turner*, 125 Neb. 603, 251 N.W. 172 (1933). The question then is whether McDonald's exercised its judgment actually and honestly when it gave the appellees "first consideration" as defined by the partial summary judgment order.

After a review of the record, we disagree with the trial court's conclusion that McDonald's acted in bad faith. McDonald's only obligation under the "first consideration" clause was to consider Markim and Roseli for a furtherance of its franchise relationship prior to considering any other prospective franchisee for those locations. It had a duty to carry out this obligation in good faith, defined as honestly and actually, and not captiously or capriciously. McDonald's carried out this obligation when it met to determine whether or not it wished to continue a franchise relationship with Markim and Roseli at their respective locations. The meeting involved the joint discussion and consideration of eight of the top management personnel of McDonald's. They met for over 2 hours and discussed all aspects of the past relationship with Mr. Schupack and his corporations and the

prospects for improving relations in the future. They discussed such things as pending litigation; noncooperation; outspoken criticism of McDonald's by the franchisee; failure to adhere to company policies and training procedures; vacillating ratings in the area of quality, service, and cleanliness inspections from year to year; and apparent resistance to attitude changes. It is not dishonest or capricious to take such factors into consideration in determining whether or not the company wished to continue a business relationship with a particular franchisee. Whether the committee's conclusions were all fully supported by the record is not necessarily determinative. The important consideration is that from an examination of all the evidence which they had, the committee members unanimously came to the conclusion that such a situation did in fact exist and, as such, a continuation of the relationship was intolerable. These factors and that conclusion may or may not constitute good cause to terminate a franchise, but by the same token they are not evidence of dishonesty and capriciousness in refusing to extend a franchise period.

The order of the District Court is reversed, and the cause is remanded for the issuance of an injunction barring the defendants from using McDonald's trademarks, trade names, and service marks after the expiration date of their franchise agreements, and for further action consistent with this opinion.

REVERSED AND REMANDED.

CLINTON, J., participating on briefs.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. The majority has concluded that the requirement of paragraph 20 of the agreement that McDonald's will give first consideration for an additional franchise merely requires McDonald's to, in good faith, mull the matter over in its mind. I do not believe

that either the language of that provision or the obvious intent of the parties can support such a conclusion.

The language of the agreement is, in my mind, clear and unambiguous. The pertinent portion provides: "If at the end of the franchise term of twenty years the premises are available and Licensee is determined in good standing by Licensor, Licensee *will be given* first consideration for an additional franchise period of five years, consistent with Licensor's rights and interests in the property." (Emphasis supplied.)

This is language prepared by the licensor and as such must be construed most favorably for the licensee and against the licensor and in accordance with the reasonable intentions of the parties. See, *Bishop Buffets, Inc. v. Westroads, Inc.*, 202 Neb. 171, 274 N.W.2d 530 (1979); *Gunset v. Mossman*, 196 Neb. 529, 243 N.W.2d 783 (1976).

It appears to me that the word "given" in paragraph 20, though not as artfully drawn as it might be, did intend to bestow upon licensee an absolute right, subject only to two conditions. The first condition is that the premises are available. And the second condition is that the licensee be in good standing. When those two conditions are met, then the licensee is to be given the "first right of refusal." The word "given" as used in paragraph 20 is a verb. Any definition of the word "given" as a verb implies to hand over or deliver to the person to whom the right is directed. See Webster's Third New International Dictionary, Unabridged, 959-60 (1968). It appears to make little sense to suggest that the parties would specifically enumerate two very basic requirements, the availability of a lease and the good standing of the licensee, as a prerequisite to a meaningless option vested solely in the licensor. It occurs to me that if the licensee was not in good standing as determined by the licensor, the licensor would not even bother to "mull over" the possibility of granting to the licensee an additional

franchise. Why then require, as a condition precedent to "giving first consideration," that the licensor determine the licensee to be in good standing? Good standing, under the terms of the agreement, required that the licensee do a host of things, all of which were intended for the benefit of the licensor and the licensor's business.

Here we have a situation in which the premises are available and the licensee has never been declared by the licensor not to be in good standing. Yet the licensor has determined that the licensee should not be granted an additional franchise. To suggest that a contract is drafted and consideration paid by the licensee to the licensor for that contract and all that the licensee gets in return for that is the courtesy of a thought, even though rendered in good faith, seems to me to ignore the realities of the business world and the obvious intent of the parties. Paragraph 20 as interpreted by the majority is rendered meaningless. I cannot believe that businesspersons enter into complicated business transactions for meaningless purposes. Apparently the trial court reached that same conclusion in compelling McDonald's to grant to the appellees an additional franchise. I agree with the action of the trial court and I would have affirmed its decision.

BRODKEY and WHITE, JJ., join in this dissent.

VALERIE A. BROWN, APPELLANT, V. NEBRASKA PUBLIC POWER DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA; LEXINGTON ALFALFA DEHYDRATORS, INC., A CORPORATION; AND LESLIE H. TURNER, APPELLEES.

306 N.W.2d 167

Filed May 29, 1981. No. 43464.

1. **Summary Judgment.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to further dispose of cases where there is no genuine claim or defense.
2. ——. The court examines the evidence, with a view most favorable to the party against whom the motion is directed, to discover if any real issue of fact exists. If reasonable persons might reach different conclusions, the motion should be denied and the case tried on its merits.
3. **Highways.** One causing an obstruction on the highway must use ordinary care to prevent injury to others using the highway.
4. **Words and Phrases: Highways.** An obstruction includes anything which will interfere with the public's use of the highway easement, and includes inanimate objects or substances which are just as dangerous and obstructive as solid obstructions.
5. **Negligence: Proximate Cause.** The question whether negligence is such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, taking into consideration the foreseeability of the intervening act, is a question of fact.

Appeal from the District Court for Dawson County: HUGH STUART, Judge. Reversed and remanded.

Stanley J. Bell and John A. Wagoner for appellant.

Kay & Kay for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

HASTINGS, J.

The appellant, Valerie A. Brown, appealed from an order of the District Court for Dawson County which sustained a motion for summary judgment against Brown and in favor of the appellee Nebraska Public Power District (NPPD). Brown assigns as error the sustaining of the motion for summary judgment and the overruling of her motion for a new trial. We reverse.

This is an action for damages for personal injuries sustained in an automobile-truck collision which occurred on June 19, 1974. Valerie Brown was driving her automobile from Lexington, Nebraska, to North Platte, Nebraska, via U.S. Highway 30 and Darr Road to Interstate 80. Her two minor children were passengers in the automobile. While driving south on Darr Road, she saw what she thought was dust blowing across the highway. She continued on, and when she drove into it she realized that it was smoke, not dust. After a short period, the smoke became dense and she decided to turn around and go back to Lexington. Brown turned west onto a graveled county road and attempted to make a U-turn back onto Darr Road to head north. Sometime during the U-turn the Brown car was struck broadside by a northbound truck hauling alfalfa, which truck was driven by defendant Leslie H. Turner.

Turner had been hauling hay since 6 a.m. that day, and had traveled Darr Road several times prior to the accident. He first noticed smoke just before 2 p.m. while traveling south on Darr Road. Turner saw three men and a pickup on the east side of Darr Road, and it appeared that they had just started burning out the ditch. Turner stated that the smoke did not amount to much, and his southbound lane was pretty clear. He proceeded south through the smoke and drove approximately 2 miles farther to a field where he picked up a load of hay and then began to return north on Darr Road to the mill.

While traveling north, Turner noticed that the smoke where Darr Road and the graveled county road intersected had become "real heavy." The smoke came from the east side of the road at the corner of the intersection and flowed west, straight across the road. The smoke covered both lanes as well as the intersecting county road. The evidence is not clear as to how fast the truck was traveling, other than testimony that it could not have been exceeding 55 miles per hour and

that Turner had his foot on the accelerator when entering the smoke. Once he entered the smoke, Turner said visibility was negligible and he did not see the Brown car until he was right upon it. The Brown car was facing east in the northbound lane and was struck broadside right in the center of the car. There were skid marks from both vehicles of slightly more than 100 feet from the intersection, straight north. Both children were killed, and Valerie Brown suffered severe and permanent injuries as a result of the collision.

The smoke was created by employees of NPPD who were burning the weeds in the borrow pit of defendant's right-of-way to prepare it for irrigation waters. The three employees had been sent out to burn the ditch, using a propane burner pulled by a tractor. Two of the men were responsible for the burning and one was responsible for fire control; the latter was equipped with a pickup carrying a supply of 100 gallons of water in a tank attached to a powered sprayer, and 50 or 100 feet of hose. According to Kenneth Kring, the man responsible for fire control, he considered his duties as being limited to keeping fire from spreading across the field, and that he was not responsible for the smoke or the hazards caused by the shift in the direction of the wind that might blow it across the highway. According to the employees, the fire was never out of control, although Kring did describe the wind as "Shifty, squirrely winds. Breezes." Kring's attention was focused on keeping the fire away from the fields, and the other two employees were operating the equipment to do the actual burning. None of them noticed the smoke blowing across the road.

Kring, who testified by means of his deposition, stated that he was told by Mr. Atterberry, the NPPD manager who assigned him to this job, "Make sure you don't get it across the road. This is — if you can anyway help it." He also said that he didn't make any effort

to determine the wind conditions because he wasn't around when they started the fire. Additionally, he had come upon the scene driving from the east to the west, and had driven through the smoke. He said it was drifting north, but he couldn't tell if it was drifting west. He did acknowledge that the fire had burned over to the west edge of the ditch, closer to Darr Road. He was asked whether he remembered seeing smoke moving westward across Darr Road, and he replied, "No, because I was on the east side of the ditch putting the fire out. . . . I could have cared less. I was interested in that fire right there."

Valerie Brown filed suit against both the driver of the truck, Leslie Turner, and NPPD for recovery of damages for personal injuries. Both defendants filed motions for summary judgment. The court overruled the motion by defendant Turner, but sustained the motion of NPPD. Plaintiff's motion for a new trial against defendant NPPD was overruled and this appeal was taken.

"The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists." *Pettis v. Lozier*, 205 Neb. 802, 806, 290 N.W.2d 215, 217 (1980). The primary purpose of the summary judgment statute is to pierce sham pleadings and to further dispose of cases where there is no genuine claim or defense. *Partridge v. Younghein*, 202 Neb. 756, 277 N.W.2d 100 (1979). The court should take the view of the evidence most favorable to the party against whom the motion is directed, and give to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. If reasonable persons might reach different conclusions, the motion should be denied and the case tried on its merits.

Farro v. Rubottom, 202 Neb. 120, 274 N.W.2d 149 (1979).

The position taken by NPPD is that even if all of the plaintiff's allegations are true, she has no genuine claim against NPPD; that there is no genuine issue of fact; and that reasonable minds could not conclude other than that the acts allegedly committed by NPPD constitute a mere "condition." A condition is not a proximate cause, and there would therefore be no basis for liability to the plaintiff. To support its argument, NPPD refers us to *Anderson v. Byrd*, 133 Neb. 483, 275 N.W. 825 (1937). *Anderson* involved an automobile collision which occurred when two cars were passing through smoke that had settled down over the highway. The smoke came from one or both locomotives that had been involved in a train wreck prior to the automobile collision. In that case, we held that the smoke was a condition and not a proximate cause of the accident, citing to authority which held that the activities of inanimate things are usually mere conditions and not causes. At first blush, *Anderson* would appear to be the same situation as the case at bar. However, after closer scrutiny it can be seen that the situations are very different.

"The rule adopted in this state is: '* * * when one engaged in the lawful use of the highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that said obstruction is calculated to do injury to travelers upon said highway. The negligence in such a case consists of having placed an obstruction upon the street, and leaving it in such a manner as will be dangerous to others using the street.' Simonsen v. Thorin, 120 Neb. 684, 234 N.W. 628, 81 A.L.R. 1000.

"An obstruction, in the sense here used, includes anything which will interfere with the public's reasonable use of the highway easement." *Shupe v.*

County of Antelope, 157 Neb. 374, 377, 59 N.W.2d 710, 713 (1953).

Although this rule has normally been applied to articles which are solid and physically impede free movement of a vehicle on a highway, there is no reason why it should not be extended to cover inanimate objects or substances which are just as dangerous and obstructive. See *Hutchinson v. Fouts*, 349 F.2d 946 (8th Cir. 1965).

The situation created by burning weeds in the borrow pit is also cause for liability under the theory of the Restatement (Second) of Torts § 371 (1965): "A possessor of land is subject to liability for physical harm to others outside of the land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of physical harm to them under the same conditions as though the activity were carried on at a neutral place." The commentators use the following illustration: "A is burning brush on his farm, at a place one hundred feet from a public highway. A high wind blows smoke from the brush fire in a thick curtain across the highway, obstructing the view of passing motorists. Because their view is obstructed B and C, driving automobiles, collide in the smoke, although they are in the exercise of all reasonable care, and are injured. A is subject to liability to both B and C."

Following the Restatement is *Timmons v. Reed*, 569 P.2d 112, 124 (Wyo. 1977), which states: "The landowner in close proximity to a public highway must exercise reasonable care to avoid injury to the traveling public arising from unnecessarily-dangerous conditions created by him on the land, where the consequences of a failure to do so are reasonably foreseeable. [Citation omitted.] A violation of this duty constitutes negligence."

The rule was also followed in *Westerman v. Stout*, 232 Pa. Super. 195, 335 A.2d 741 (1975), which involved an automobile accident that was the apparent result

of a thick fog created by a cooling tower owned by United Aircraft. "United Aircraft cannot now argue that although they knew that fog was created, they had no notice that it would cover the turnpike and create a traffic hazard. United Aircraft must be charged with knowledge that once the fog was created, it could be blown onto the road surface. It was bound to anticipate the action of the wind and realize that the man-made fog could reach the roadway and cause visibility problems." *Westerman* at 201, 335 A.2d at 745.

For further authority, see, Annot., 150 A.L.R. 371 (1944); *Gulf Oil Corp. v. Turner*, 235 So. 2d 464 (Miss. 1970), and *Moore v. Plymouth*, 249 N.C. 423, 106 S.E.2d 695 (1959), and the cases cited therein.

Should a jury find that either Mr. Turner or Mrs. Brown was negligently operating his or her vehicle, such finding would not necessarily insulate any liability on the part of NPPD. "Generally, the effect of an intervening negligent act is tested by determining whether it was such as might reasonably have been foreseen as a consequence of the claimed negligence of the original actor. . . . The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen. The question whether negligence is, in view of the intervening negligence of a third person, such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, is a question of fact, rather than a question of law." *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 801, 205 N.W.2d 523, 529 (1973).

Taking the view most favorable to Mrs. Brown, and giving to her the benefit of all favorable inferences which may reasonably be drawn from the evidence, we conclude that there are genuine issues of fact which should have been submitted to the jury. The facts presented could support a finding of negligence

on the part of NPPD if there is sufficient proof that NPPD, through its employees, placed an obstruction upon the highway which is known to be dangerous to travelers on the highway, and that NPPD had failed to use ordinary care to prevent injury to others. The question whether such negligence is a continuing and substantial factor in producing the accident so as to be a proximate cause of the injury is also a question of fact to be submitted to the jury. We conclude that it was error to sustain defendant NPPD's motion for summary judgment, and that the judgment should be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WILLIAM H. SHERWOOD, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF FLOYD TILSON BROWN, DECEASED, APPELLEE, AND J. LELAND BROWN, APPELLANT, V. F. STANTON BROWN ET AL., APPELLEES.

306 N.W.2d 171

Filed May 29, 1981. No. 43465.

1. **Trial: Judicial Notice.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
2. **Trusts.** Where a constructive trust has been imposed, the court may trace the trust res into the hands of subsequent purchasers who are not bona fide purchasers for value and without notice.

Appeal from the District Court for Furnas County: JACK H. HENDRIX, Judge. Reversed and remanded with directions.

Barry L. Hemmerling and Jeffrey, Jeffrey, Hahn & Hemmerling, P.C., for appellant.

John Wightman of Wightman, Fallesen & Bacon for appellees Brown et al.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and RICHLING, District Judge.

WHITE, J.

Plaintiff, J. Leland Brown, appeals from a decision of the Furnas County District Court granting defendants' motion for summary judgment in this action to quiet title to a parcel of real estate in Furnas County, Nebraska. This action is one of a series of related cases from Furnas County involving J. Leland Brown and F. Stanton Brown, brothers, the estate of their deceased father, Floyd T. Brown, the Stamford Bank (Nebraska), and its holding company, Stamford Banco, Inc. Pertinent parts of the 10-year-plus history of the present case and the related cases are set out below.

The deceased (hereafter Floyd) owned property in Furnas County, Nebraska, which he farmed under terms of a partnership with his elder son, F. Stanton Brown (hereafter Stanton). This operation will be referred to as the Nebraska Partnership. Floyd also owned land in Madison County, Mississippi, which he and J. Leland Brown (hereafter Leland) operated as a partnership (hereafter Mississippi Partnership). Bank accounts for both partnerships, as well as the separate personal bank accounts of Floyd and Stanton (Leland had no personal account), were kept at the Stamford Bank (hereafter Bank) which in 1968 was purchased by a holding company, Stamford Banco, Inc. (hereafter Banco). In 1962 Floyd's separate personal account at the Bank was closed out, and in 1963 he was declared legally incompetent and Stanton was appointed his guardian, and another account was opened at the Bank entitled Floyd T. Brown, Incompetent, F. Stanton Brown, Guardian.

Stanton at all times pertinent lived in Furnas County, while Leland lived in Mississippi. Floyd journeyed

back and forth between Nebraska and Mississippi. It would appear from the records of the various related cases (all filed as part of the bill of exceptions in this case) that the Bank viewed Stanton as a representative of all the Brown family bank accounts, and it is conceivable, although hotly disputed, that at least at times Leland and Floyd depended upon Stanton to handle the banking operations, if only for geographical reasons. However, it not being necessary to a decision in this case, we make no decision as to whether or not Stanton was legally authorized to draw checks on all the Brown accounts at the Bank.

In 1966, or before (another disputed matter), Leland began to become aware that certain large amounts of money he had mailed to Nebraska for deposit to the Mississippi Partnership account had found their way into other Brown family accounts. It is disputed as to whether Leland mailed the money, in the form of checks, to Stanton or directly to the Bank. At any rate, Leland investigated and in 1968 brought an action in Furnas County Court, *In the Matter of the Guardianship of Floyd T. Brown*, asking an accounting by Stanton for his activities and expenditures as Floyd's guardian. Shortly after this action was commenced, Floyd died, and William F. Sherwood was appointed administrator with the will annexed of Floyd's estate. In late 1969 Leland's guardianship action resulted in a judgment surcharging Stanton approximately $65,000 for his activities as Floyd's guardian. Sherwood appealed that decision to Furnas County District Court, which became case No. 7096 in that court. In the meantime, Sherwood, as administrator, had filed a separate action in Furnas County District Court, *Sherwood v. Brown*, against both Leland and Stanton, asking that they both account to the estate for money and property then in their possession or control. This became case No. 7091. Case Nos. 7096, the guardianship appeal, and 7091, the administrator's accounting action against both sons,

were consolidated for trial in February 1970. At that time neither case yet involved the parcel of real estate involved in the present case. In May 1970 Leland filed a third-party complaint against the Bank in the consolidated cases. Most of the petition was eventually stricken and, as to the remainder, a jury found that the action was barred by the statute of limitations. In October 1970 Leland sought leave to file another third-party complaint in the consolidated cases, this one against Banco, and in the proposed petition filed with the court brought in for the first time the parcel of realty involved here.

Leland's proposed third-party petition against Banco contains basically the same allegations as are contained in the petition filed in this case, so they will be set out here. He alleged that on July 25, 1961, Stanton purchased the west one-half of the west one-half of Section 10, Township 1 North, Range 21 West of the 6th P.M., Furnas County, Nebraska (hereafter Farrand Quarter), from the estate of Walter I. Farrand at a referee's sale. To pay for the land, Stanton issued two checks on his personal account and borrowed money from the Bank to cover them. He also borrowed $15,000 from the Veterans Administration and gave that agency a mortgage on the Farrand Quarter in that amount. Leland further alleged that Stanton's personal indebtedness to the Bank grew to $18,500 by June 13, 1962, and that on that date Stanton reduced his personal indebtedness by $16,000 when he transferred $10,000 of his own notes to the Nebraska Partnership account and $6,000 of his own notes to Floyd's personal account. On April 9, 1970, Stanton gave the Bank a deed to the Farrand Quarter in exchange for the Bank's canceling approximately $23,000 in Stanton's notes and its assuming the Veterans Administration mortgage. On April 20, 1970, the Bank conveyed the Farrand Quarter to Banco, whose officers and directors were largely the officers and directors of the Bank. Leland's proposed

petition then stated that neither the Bank nor Banco could have been bona fide purchasers in good faith since they knew of the alleged note transfer by Stanton, which Leland claimed gave Floyd's estate an interest in the property. He asked that title to the Farrand Quarter be quieted in the heirs of Floyd and that the deed to the Bank and to Banco be set aside.

On February 11, 1971, Leland's motion for leave to file this proposed petition was overruled by the District Court. On May 14, 1971, Leland and Sherwood filed the present quiet title action against Stanton, the Bank, Banco, and Paul and Duane Johnson (hereafter Johnsons), who, in September 1970, had received a deed to the Farrand Quarter from Banco. The petition filed in the present case alleged that Stanton retired the notes he had transferred with the proceeds from (1) the sale of Mississippi Partnership cattle and (2) a loan from the Lamar Life Insurance Company which was secured by a mortgage on land owned by Floyd in Mississippi. The gist of the petition is that since the notes which had covered Stanton's personal checks to purchase the Farrand Quarter were part of the personal indebtedness he had reduced by transferring the notes, and since he had allegedly misappropriated the cattle proceeds and loan proceeds to retire these notes, his title to the Farrand Quarter was obtained by fraud. Although the petition did not request the imposition of a constructive trust on the Farrand Quarter, it was upon that theory that the case was argued in the District Court and in this court. In the present action, defendants Bank, Banco, and Johnsons eventually moved for summary judgment, which was granted by the District Court on the basis that no constructive trust could be imposed since there appeared to have been no "wrongdoing at the inception of the title." Sherwood is no longer in the case as a plaintiff, having settled all the estate's claims against the Bank and Banco for $12,500. See *Brown v. Sherwood*, 203 Neb. 209, 278 N.W.2d 565 (1979).

As to the remaining parties, we must reverse the judgment of the trial court. The issue of a constructive trust upon the Farrand Quarter has been fully litigated as between Leland, Stanton, and Sherwood. In a 1972 judgment in the consolidated cases, the District Court ruled on the constructive trust issue. We quote from the memorandum opinion incorporated into that judgment: "[T]he estate claims a constructive trust in the ostensible profit of $13,080.00, six-sixteenths to Mississippi Partnership and ten-sixteenths to Floyd. . . . In this case, the property was initially purchased on the credit of Stanton. Then Stanton borrowed funds to the extent of $6,920.00, the debts being later transferred to two entities along with an additional transfer of $9,080.00 of other debts. Then, the notes were paid in different proportions by one of the entities and a different entity. . . .

. . . .

". . . The court does feel . . . that . . . a portion of the consideration paid by Stanton can be traced to Floyd and the Mississippi Partnership. . . . The Veterans Administration Loan was obtained on Stanton's credit, and transferred to the Stamford Bank. No part of that credit has been traced to the res. Therefore, only *seven twenty-seconds of the Farrand Quarter is determined to be held in trust.*

"Seven twenty-seconds of the profit of $13,080.00, or $4,161.82, is charged to Stanton. The Estate shall be credited with ten-sixteenths of said amount, or $2,601.10. The Mississippi Partnership shall be credited with six-sixteenths of said amount, or $1,560.66." (Emphasis supplied.) *Sherwood v. Brown*, Nos. 7091 and 7096. Memorandum Opinion of May 19, 1972.

Although neither party in the briefs to this court points out the fact of this prior decision of the District Court in the consolidated cases, this court has held that: "'[W]here cases are interwoven and interdependent and the controversy involved has already

been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.'" *Johnson v. Marsh*, 146 Neb. 257, 262, 19 N.W.2d 366, 369 (1945); *Reeves v. Watkins*, 208 Neb. 804, 305 N.W.2d 815 (1981). The decision in the consolidated cases was appealed to this court by Leland in 1973, but was dismissed on his own motion. In addition, the memorandum opinion and, in fact, the entire record in the consolidated cases were filed as part of the bill of exceptions in the present case, and thus we may examine those records, given the undeniable interdependence of the Brown cases. Our examination finds that, as between Leland and Stanton, the constructive trust issue was conclusively settled by the order of the District Court in the consolidated cases. Thus, the issue of Stanton's fraud may not now be relitigated. *Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 281 N.W.2d 525 (1979).

As between Leland and these defendants, we note that the petition filed in this case does not allege any independent or unrelated fraud upon Leland by the Bank, Banco, or Johnsons *at the time* they obtained their respective titles to the Farrand Quarter. The allegations against these defendants, in sum, raise the issue of their status as bona fide purchasers for value without notice of Stanton's fraud with respect to that parcel of property. The only manner in which their status as such could present an issue would be if Leland has been unable to collect the proceeds of the funds upon which the trial court in the consolidated cases imposed a constructive trust. If he has been unable to collect, Nebraska law allows the courts to trace the trust res into the hands of subsequent purchasers who are not bona fide purchasers for value and without notice. *Meier v. Geldis*, 148 Neb. 304, 27 N.W.2d 215 (1947); *Meier v. Trosper*, 152 Neb. 184,

40 N.W.2d 811 (1950); *Meier v. Meyer*, 153 Neb. 222, 43 N.W.2d 502 (1950).

In the consolidated cases, the trial court imposed a constructive trust upon seven twenty-seconds of the profit received by Stanton when he transferred the Farrand Quarter to the Bank, with a portion of the money so entrusted to be credited to the Mississippi Partnership, of which Leland would be entitled to one-half interest. In 1973 Leland brought proceedings in garnishment, based on that judgment, to obtain approximately $25,000 of Stanton's funds which were held at the time by Sherwood. The record in the consolidated cases shows that Leland signed a receipt for $25,915.11 as a result of successful garnishment of those funds. However, the total amount of money due Leland or the Mississippi Partnership from Stanton as a result of the 1972 order in the consolidated cases was in excess of $25,000, and thus we have no way of knowing whether or not the garnished funds represented payment to Leland from Stanton for misappropriation of Leland's funds in the Farrand Quarter purchase. On remand, therefore, it will be for the District Court to determine whether or not Leland has, in this or any other manner, collected the amount of money due him from Stanton by virtue of the constructive trust already imposed. If he has received that money from Stanton, there will be no need to determine the bona fide purchaser status of the defendants Bank, Banco, or Johnsons since there will be no need to trace the res into their hands. However, if the money Leland received in garnishment proceedings did not include payment per the constructive trust, the court must then determine the bona fide purchaser status of these defendants as it relates to tracing the trust res into their hands. Consequently, there is a genuine issue of a material fact to be determined and summary judgment should not have been granted. *State ex rel. Schuler v. Bd. of County Commissioners*, 205 Neb. 647, 289 N.W.2d 514 (1980).

We therefore reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF J.L.L., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. E.F.L., HIS FATHER, APPELLANT.

306 N.W.2d 175

Filed May 29, 1981. No. 43545.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile case to this court is heard de novo upon the record; and the findings of fact by the trial court which heard and observed the witnesses and parties are accorded great weight and will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
2. **Parental Rights.** An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be supported by clear and convincing evidence.
3. **Juvenile Courts: Statutes: Constitutional Law.** Neb. Rev. Stat. § 43-209 (Reissue 1978) is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness.
4. **Parental Rights.** The right of a parent to maintain the custody of his or her child is a natural but not inalienable right, and the public has a paramount interest in the protection of the rights of a child.

Appeal from the Separate Juvenile Court of Lancaster County. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Don C. Bauermeister for appellant.

Ron Lahners, Lancaster County Attorney, and Richard Hautzinger for appellee State.

Richard McClain, guardian ad litem.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

E.F.L., appellant and natural father of J.L.L., appeals to this court from an order entered by the separate juvenile court of Lancaster County, Nebraska, terminating his parental rights to his son, who was born October 1, 1970. We affirm.

The record in this case reveals that the juvenile court first became involved with J.L.L. on November 30, 1976, when the Lancaster County attorney filed a petition alleging that the child was within the meaning of Neb. Rev. Stat. § 43-202(1) (Reissue 1978) because of lack of proper parental care and support. The petition alleged: "Said child is without proper parental care and support in that his father is incarcerated in the Lincoln City Jail, Lincoln, Nebraska, and the whereabouts of his mother is unknown. There are no known relatives who are able to provide care for said child, all in Lancaster County, Nebraska." After a hearing on the petition, held on December 13, 1976, the court determined that the allegations were true, adjudicated J.L.L. to be a dependent child within the court's jurisdiction, and placed him in the temporary custody of the Lancaster County Department of Public Welfare for placement in an approved foster home.

On January 24, 1977, the Lancaster County attorney filed a supplemental petition with the court, alleging the child to be within both subsections (1) and (2) of § 43-202, for the reason that: "Said child is without proper parental care due to the fault and habits of his father and in that his mother is unable to provide care for him. The father of said child has been sentenced to a term of 28 months to 5 years at the Nebraska Penal and Correctional Complex on a conviction of grand larceny. The father of said child has a history of anti-social, criminal behavior and has allowed the child to accompany him while in the commission of burglaries. The lifestyle and criminal activity of the father has provided an unsuitable model for the child. The mother of said child has had no contact with the child for two years. She lives in a board and room situation which is

not adequate for the care of the child and because of mental and emotional instability is unable to provide care and supervision for the child, all in Lancaster County, Nebraska." A hearing on the supplemental petition was held on February 9, 1977, following which the court entered its decree finding that J.L.L. was both a dependent and neglected child as defined in the aforementioned statute. The hearing was continued to March 3, 1977, at which time the court determined that the child should not participate in any visitations with his father until psychological evaluations of the appellant had been completed.

On May 20, 1977, the matter came before the juvenile court for further hearing to determine the visitation rights of the parties herein. At that time, the court found that the child would not be harmed by closely supervised visits with his father, and ordered that they take place; provided, however, that the assigned caseworker could alter the visitations if the child was adversely affected by such visitations.

E.F.L. was paroled from the Nebraska Penal and Correctional Complex on November 21, 1978. It appears that he then found employment in Lincoln, rented an apartment, and continued his supervised visits with his son. On January 16, 1979, on his motion for a modification of the court's visitation order, the court ordered that he could begin unsupervised visitations with his son, beginning February 26, 1979. The order of the juvenile court, however, was objected to for a number of reasons by the guardian ad litem for the child, including that the visitations were against the express wishes of the child; because of the previous threats of the father to remove the child from the jurisdiction; and also in view of the statements of the child that he had been sexually abused by his father. The guardian ad litem appealed the juvenile court's visitation order to this court, and the order allowing unsupervised visitation was stayed during the pendency of the appeal. In our opinion in that case we reversed the order of the juvenile court which had allowed unsupervised visitations

between the child and his father. However, on November 21, 1979, and prior to the release of our opinion above referred to, the father was arrested and was charged with two counts of burglary. He pled nolo contendere to both counts, and was subsequently sentenced to two terms of 5 to 10 years in the Nebraska Penal and Correctional Complex, said terms to run concurrently with each other.

Thereafter, on January 23, 1980, the Lancaster County attorney filed a second supplemental petition in which he prayed for an order terminating all parental rights between the father and son. A hearing on the petition was held on January 31, 1980, at which time the natural mother of the child, since divorced, appeared and entered her "admission" to the allegations of the petition that she was unable to care for and support her child. The father also appeared at the hearing and entered a denial to the allegations contained therein. The court then entered an order accepting the admission of the mother and set the date for the formal contested hearing on the allegations against the father.

The contested hearing was held on March 5 and March 10, 1980, on that portion of the second supplemental petition which requested termination of the parental rights of E.F.L. In its decree, entered on March 24, 1980, the court found that the allegations of neglect and dependency were substantiated by clear and convincing evidence, and ordered that the father's parental rights be terminated. A subsequent motion for new trial was overruled, and he has appealed to this court, contending that the evidence presented was not sufficient to terminate his parental rights and that Neb. Rev. Stat. § 43-209(2), (4), and (6) (Reissue 1978) should be held unconstitutional for vagueness.

It is well established that an appeal of a juvenile proceeding to this court is heard de novo upon the record; that the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses; and the trial court's findings will not be set aside on appeal unless

they are against the weight of the evidence or there is a clear abuse of discretion. *In re Interest of Goodon*, 208 Neb. 256, 303 N.W.2d 278 (1981); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981); *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979).

Under § 43-209 the juvenile court may terminate parental rights between the parents of a child and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that any one or more of the six specified conditions exist, including:

"(2) The parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection;

. . . .

"(4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child;

. . . .

"(6) Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."

It is the general rule that an order of the juvenile court terminating parental rights under § 43-209 must be supported by clear and convincing evidence. *In re Interest of Hill*, 207 Neb. 234, 298 N.W.2d 143 (1980); *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980); *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979).

We have reviewed the record in the present case and have concluded that the evidence contained in the record amply supports the decision of the juvenile court to terminate the parental rights of E.F.L. The foster care mother of the child testified that the child exhibited signs of mental and emotional stress, including

nightmares and hyperactivity, after being with his father. She indicated that his condition had improved after he was removed from his father's care. She also stated that the child became upset when he learned of his father's criminal activities.

Carol Crumpacker, a child psychologist at the Child Guidance Center in Lincoln, testified that she had met with the child once a week for approximately 1 year. She stated that he exhibited conflicting feelings toward his father and that he had experienced feelings of guilt because of his father's criminal conduct. Dr. Crumpacker also testified that the child expressed much anger and ambivalence toward his father, and that it would be in the child's best interests to be placed in a stable family environment. Dr. Crumpacker stated that she thought it would be best to terminate the parental rights of the father.

Sandy Carmichael and Kathleen Dombrowski, both social workers with the Lancaster Public Welfare Department, testified that they had supervised visitations between the child and his father. The visitations took place at the Nebraska Penal and Correctional Complex and at an apartment rented by the appellant after his parole. Both women stated that there was very little interaction between the boy and his father during the visitations, and that the father spent most of his time discussing his future plans with the social workers. It appears that the father told both social workers that if his parental rights were terminated he would take his son away when he got out of prison. Both of the social workers stated that the son was apprehensive about visiting his father.

Finally, at a hearing held in this matter on March 3, 1980, the son testified as to his treatment by his father. He stated that there had been several occasions when sexual contact had occurred between him and his father. He also stated that his father had told him to keep the sexual contacts a secret between the two of them. In addition, he testified that his father had taken

him with him when he burglarized an apartment.

The trial court found that the termination of the parental rights was justified, basing its decision on the established evidence of continuing criminal conduct of the type in which the father had involved the son in the past, and his continued and repeated neglect and failure to provide proper parental care and support. In its order the court did not specifically mention the evidence of his sexual abuse of the child, although there is ample evidence in the record to establish this fact.

We determine that the findings of the trial court are supported by clear and convincing evidence in the record on appeal, and that the order terminating the parental rights of the father is correct and should be affirmed.

We also wish to comment briefly on appellant's assignment of error that § 43-209(2), (4), and (6) (Reissue 1978) is unconstitutionally vague. We have previously passed upon this issue in several prior opinions of this court, and the constitutionality of § 43-209 has been upheld with respect to the termination of parental rights under the above statute. See, *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981); *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979); *State v. Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979); and *State v. A.H.*, 198 Neb. 444, 253 N.W.2d 283 (1977). In *Linn v. Linn*, 205 Neb. 218, 286 N.W.2d 765 (1980), we had under consideration the constitutionality of Neb. Rev. Stat. § 42-364 (Reissue 1978), which deals with the termination of the parental rights of children in dissolution actions. In *Linn* we held that the termination of parental rights because it is in the "best interests and welfare of the children," as provided for in § 42-364(4), is not sufficiently specific to apprise parents of why the state may find it necessary to terminate parental rights and is an insufficient warning of prohibited conduct by which the parents can regulate their parental activities. As such, it is impermissibly vague and is unconstitutional. In that case, however, we approved the consti-

tutionality of § 43-209, stating at 223, 286 N.W.2d at 768-69: "What a far cry those standards are from the ones involved in this case. Section 42-364, R.R.S. 1943, provides in part as follows: '(4) Whenever termination of parental rights is placed in issue by the pleadings or evidence, the court shall forthwith appoint an attorney as guardian ad litem to protect the interests of any minor children. Such guardian ad litem shall forthwith personally investigate the facts and circumstances on all matters pertinent to the best interests and welfare of the children. *If it appears to the guardian ad litem that the best interests and welfare of the children may require the termination of the parental rights of one or both parents,* he shall apply to the court in writing or orally on the record for such termination. *The court may then terminate the parental rights of one or both parents after notice and hearing and shall serve notice thereof upon the parents.*' (Emphasis supplied.)

"The statute goes on to provide that the court shall notify the parents of their right to counsel at the expense of the county if they are indigent. However, it sets forth no guidelines for the court to follow, although presumably the permission to terminate parental rights after notice and hearing shall be as the 'best interests and welfare of the children may require.' This is the same general standard required of the juvenile courts as set forth in section 43-209, R.R.S. 1943, without the additional requirement that at least one of six conditions going to the unfitness of the parents has been found to exist. In addition to the two cited in State v. A.H., 198 Neb. 444, 253 N.W.2d 283 (1977), the statute also sets forth abandonment of the child, repeated neglect and withholding of parental care, failure to provide necessary subsistence, education, or other care necessary for the child's health, or that the child has been determined to be a child described in section 43-202 (1) or (2), R.R.S. 1943."

In support of his contention that § 43-209(2), (4), and (6) is void for vagueness, the appellant relies principally

on an Iowa case, *Alsager v. District Court of Polk Cty., Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975), in which the U.S. District Court, in discussing the constitutionality of the Iowa statute with reference to the termination of parental rights, did hold the provisions of that statute to be unconstitutionally vague. We believe the statutes of Nebraska and Iowa are clearly distinguishable, and that the provisions of § 43-209 are much more specific and precise than are the provisions of the Iowa statute. However, we need not decide that issue in this case, even if we were inclined to change our previous position with reference to the constitutionality of the Nebraska statute, for the reason that the *Alsager* case was appealed to the U.S. Court of Appeals, Eighth Circuit, which case is found at 545 F.2d 1137 (1976). In that case the court affirmed the decision of the lower court on the grounds that the plaintiffs were denied procedural due process because of failure to receive adequate notice, and also that the state did not have a compelling interest sufficient to justify permanent termination of the parent-child relationships. However, with reference to the attack on the Iowa statute because of vagueness and overbreadth, the court on appeal stated at 1137-38:

"Other issues reached by the district court, *viz.*, the vagueness and overbreadth attacks upon the facial validity of *Code of Iowa* § 232.41(2)(b) and (d), 406 F. Supp. at 17-21 and 24, and the appropriate standard of proof at a parental termination hearing, 406 F. Supp. at 25, need not now be resolved in order to effect a plenary disposition of the present controversy between the parties, and we do not reach such issues. . . .

. . . .

"Since we expressly reserve a ruling on the question of whether the Iowa statutory provisions at issue in this case are facially unconstitutional, there is no collateral estoppel effect to be accorded the district court's resolution of this question in the future."

We have frequently held that the right of a parent to maintain the custody of his or her children is a natural

but not inalienable right and the public has a paramount interest in the protection of the rights of a child. *State v. A.H.*, 198 Neb. 444, 253 N.W.2d 283 (1977); *State v. Logan*, 204 Neb. 204, 281 N.W.2d 753 (1979). We think it is clear that the State does, indeed, have a "compelling state interest" justifying termination of parental rights, particularly under the facts of the instant case as set out and discussed in some detail above.

We feel that we should point out one further matter with reference to the status of the natural mother of J.L.L. In its order terminating the parental rights of the father in this case, the court stated: "The legal custody of [J.L.L.] is continued with the Lancaster County Department of Public Welfare for care in an approved foster family home, subject to further hearings and orders of this court as they relate to the rights of [the natural mother]."

We conclude, therefore, that appellant's assignments of error are without merit and that the separate juvenile court of Lancaster County properly terminated the parental rights of appellant based upon the evidence in the record, and we determine that the order of the separate juvenile court was correct and should be affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. LARRY E. SMITH, APPELLANT.

306 N.W.2d 181

Filed May 29, 1981. No. 43685

1. **Constitutional Law: Right to Counsel: Identification Procedures: Indictments and Informations.** The sixth amendment right to assistance of counsel at a police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information.
2. **Constitutional Law: Indictments and Informations: Identification Procedures.** A preindictment or preinformation lineup may be challenged on due process grounds if the lineup is unnecessarily suggestive and conducive to irreparable mistaken identification.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Jerry N. Stehlik, Deputy County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Lynne Fritz for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

Appellant was convicted by a jury in the District Court for Buffalo County, Nebraska, of robbery and the use of a firearm to commit a felony, and was found by the court to be an habitual criminal. He received a sentence of 10 to 15 years in prison for the robbery and a consecutive sentence of 1 to 2 years for the use of a firearm in the commission of a felony, with credit given for 131 days previously served. He appeals, assigning as error the trial court's failure to suppress in-court identification of him by two eyewitnesses to the robbery. We affirm.

Appellant was arrested at about 3:30 a.m. on April 9, 1980, approximately 4 hours after the Best Western Inn in Kearney was robbed near midnight on April 8, 1980.

About 12 hours after appellant's arrest, and before the filing of formal charges against him, a lineup was conducted by the Kearney police, participated in by appellant and four other men. The motel desk clerk on duty at the time of the robbery and another eyewitness to the robbery both identified defendant at the lineup, as they did at trial. Both before and during trial, appellant moved to suppress the identifications on the ground that the lineup was unduly suggestive. The motions were overruled. In this court, appellant contends, additionally, that the identifications should be suppressed because he was not represented by counsel at the time of the lineup and thus his sixth amendment right to assistance of counsel in a criminal proceeding was violated.

In *Kirby v. Illinois*, 406 U.S. 682, 688, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), the U.S. Supreme Court held that the sixth amendment right to assistance of counsel in a lineup situation "attaches only at or after the time that adversary judicial proceedings have been initiated against" the defendant by the filing of an indictment or information. This is also the rule in Nebraska. *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976). Appellant was not entitled to assistance of counsel at the time the lineup here was held since formal charges had not then been filed against him, and, thus, the identification may not be suppressed on that ground.

A preindictment or preinformation lineup may still be challenged on due process grounds if the lineup is unnecessarily suggestive and conducive to irreparable mistaken identification. *Kirby v. Illinois, supra; Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). However, the trial court determined that the lineup in this case was not unconstitutionally suggestive, and we agree. Although appellant was the only one of the five men in the lineup with shoulder-length hair, both witnesses who identified him testified that they did so on the basis of his facial features and general body structure. In addition, the evidence shows that

appellant was wearing a large hat at the time of the robbery and not at the lineup, which tends to corroborate the witnesses' testimony that hair length was not a major factor in their identification of him. The lineup was not unduly suggestive, and this assignment of error is without merit. Although not urged by the State, it is obvious from the record that the witnesses saw the defendant in clear light for 20 minutes at distances as close as 2 feet and had an independent recollection of him sufficient to permit them to independently identify him at trial, even if the previous lineup evidence had been suppressed. Further, the defendant's fellow participant in the robbery testified at trial and identified the defendant as the person who held the gun on the witness victims. The appeal is thus totally without merit and the judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD F. MOORE, APPELLANT.

306 N.W.2d 183

Filed May 29, 1981. No. 43699.

Homicide: Sentences. A sentence to life imprisonment for second degree murder is effective as an indeterminate sentence of 10 years to life.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant, Donald F. Moore, appeals from a

sentence of life imprisonment for second degree murder. The defendant was originally charged with murder in the first degree in the robbery and shooting of Omaha cab driver Reuel Eugene Van Ness, Jr. Later he agreed to plead guilty to an amended information charging second degree murder. The defendant, in this appeal, contends that the sentence imposed was excessive.

Although the sentence to life imprisonment was the maximum sentence authorized for the offense, under our decisions it is an indeterminate sentence of 10 years to life. See, *State v. Randall*, 208 Neb. 248, 302 N.W.2d 733 (1981); *State v. Thompson*, 189 Neb. 115, 201 N.W.2d 204 (1972).

Prior to the acceptance of the defendant's guilty plea, the trial court examined the defendant to determine the extent and nature of his involvement in the offense. The defendant stated that, on the evening of August 22, 1979, he and his 21-year-old brother, Carey Dean Moore, planned to rob a cab driver. The two had gone to a movie earlier in the evening and then proceeded to the Smoke Pit restaurant where Carey called a cab. Carey and the defendant had something to eat while waiting for the cab.

When the cab arrived, Carey indicated to the defendant that it was the cab they would rob. The defendant said that one of the reasons they chose that particular driver was because he was old and less likely to chase them.

The defendant knew that his brother was carrying a loaded .32-caliber automatic pistol and had considered that there might be some shooting. During questioning by the court, the defendant stated: "Mr. Moore: I took in consideration that there might be some shooting. The Court: And why? Was that something Dean said or just the fact you had a gun? Mr. Moore: Yes. . . . The Court: But you knew you were going to rob him or at least try to? Mr. Moore: Right. The Court: And you knew there

was a possibility of him being killed or shot? Mr. Moore: Yes."

The brothers instructed the driver to take them to Dam Site No. 16 outside of Omaha. Upon reaching the dam site, Carey produced the gun and demanded that the driver hand his money to the defendant. After receiving $70 from the driver, the defendant stepped from the cab. The defendant's brother then shot the cab driver, Reuel Eugene Van Ness, Jr., in the back, three or four times, killing him. Van Ness fell from the cab. The defendant then got behind the wheel and drove the taxi back to Omaha while his brother remained in the back seat wiping away fingerprints. The defendant parked the taxi approximately 6 blocks from their home. They divided the money taken from the driver, and then walked home.

The defendant's brother, Carey Dean Moore, has been convicted of first degree murder and sentenced to death.

The defendant bases his appeal for a reduction in sentence on the fact that at the time of the offense he was only 14 years of age, and urges that he was under the influence of his older brother at the time of the commission of the murder. The record, however, indicates that the defendant was fully aware of the possible consequences of the armed robbery.

The trial judge, in imposing the sentence of life imprisonment, noted that there was ample evidence to support a conviction for first degree murder under the felony murder statute and that, while the defendant was only 14 years old, he had been involved in prior criminal activity. The defendant's attitude, as disclosed in the psychiatric report, was an additional reason given for the sentence imposed.

The savage nature of the crime and the defendant's willing and knowing participation in it fully support the judgment of conviction and the sentence imposed. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL W. SARE, APPELLANT.

306 N.W.2d 164

Filed May 29, 1981. No. 43946

Assault: Words and Phrases. Multiple injuries including a cerebral concussion and nasal fracture constitute serious bodily injuries which will support a conviction for first degree assault under Neb. Rev. Stat. § 28-308(1) (Reissue 1979).

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Stephen Greenberg for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant appeals from a conviction for first degree assault of Rodney Smiley on or about July 5, 1980. The State dismissed a second count of first degree assault in return for the defendant's plea of guilty. The defendant was represented by private counsel at the arraignment and was extensively questioned by the trial judge to determine that the plea was voluntarily and intelligently made. The District Court accepted the defendant's plea and sentenced the defendant to a term of 5 to 15 years' imprisonment in the Nebraska Penal Complex.

The defendant contends the District Court committed a plain error in that there was no factual basis for the plea to assault in the first degree, and the sentence imposed was excessive.

At a felony arraignment the trial court is required to ascertain there is a factual basis for the plea before a plea of guilty may be accepted. *State v. LeGear*, 187 Neb. 763, 193 N.W.2d 763 (1972). The factual basis may

be determined from inquiry of the defendant, inquiry of the county attorney, or examination of the presentence report. *Id.* at 766, 193 N.W.2d at 765.

Here the trial court was advised by the county attorney of the facts surrounding the offense. The trial court also made use of a thorough presentence report which described the assault in detail and the extent of injuries to Smiley.

The defendant argues that the injuries suffered by Smiley were not sufficient to support a conviction for assault in the first degree under Neb. Rev. Stat. § 28-308(1) (Reissue 1979), which requires that the victim sustain "serious bodily injury." Serious bodily injury is defined in Neb. Rev. Stat. § 28-109(20) (Reissue 1979) as follows: "Serious bodily injury shall mean bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body."

In 1977 the defendant was sentenced to 2 years' imprisonment for assault with intent to rob Smiley. This charge resulted from an armed robbery of a filling station at which Smiley was the attendant. Smiley identified the defendant as the robber. After being released from prison, the defendant threatened Smiley on several occasions.

The assault involved in this case took place on a farm in Sarpy County where a number of young people were having a party. The defendant and four other companions, at least one of whom was armed, sought out Smiley and proceeded to beat him severely. The defendant struck Smiley 10 to 15 times in the face and kicked him repeatedly.

Smiley's girl friend, who was an eyewitness to the attack, described his injuries as follows: "Yes, he lost alot of blood, both of his eyes were black, cracked teeth falling, his one eye was so swollen it just looked like a slit, his nose was broken in four different places, his nasal passages were clogged because the walls were

pressing against them, his lips were all swollen, he's got bruises all over, his legs got bruises up and down, he's got bruised bones in his rib cage, two concusions [sic]." Smiley was hospitalized for 5 days and underwent surgery for removal of a bone fragment that was floating unattached in his nasal passage.

Smiley was off work for 3 weeks following his release from the hospital and his medical expense was in excess of $2,000. At sentencing, the trial court noted from the presentence report the severe nature of the beating Smiley had received. The court stated: "It wasn't just a broken nose. There was a brain concussion with it, there were bruises and contusions around the body. When he tried to get up and get away from you, and not just you, but there was another one with you that was helping you beat up on him, and all he was doing was walking with his girlfriend, and when he tried to get away from you, you chased him around and smashed his head into the hood of a truck with enough force that there was blood left on the hood."

The presentence report established a factual basis for the plea of guilty to first degree assault because it shows the victim suffered serious bodily injury. The victim sustained a cerebral concussion, was unconscious for 15 minutes, and suffered a serious nasal fracture. This finding is supported by decisions in other jurisdictions which have reviewed similar aggravated battery statutes. Serious bodily injury or great bodily harm was found to support convictions in cases involving similar or lesser injuries. *Baker v. State*, 246 Ga. 317, 271 S.E.2d 360 (1980) (broken nose and bruises); *People v. Caliendo*, 84 Ill. App. 3d 987, 405 N.E.2d 1133 (1980) (fractured ribs and lacerations); *People v. Rickman*, 73 Ill. App. 3d 755, 391 N.E.2d 1114 (1979) (broken ankle); *State v. Colomy*, 407 A.2d 1115 (Me. 1979) (contusion of the kidney); *State v. Fuger*, 170 Mont. 442, 554 P.2d 1338 (1976) (broken nose and fractured palate); *Commonwealth v. Alexander, Aplnt.*, 237 Pa. Super. Ct. 111, 346 A.2d 319 (1975) (broken nose and blackened eyes).

The maximum sentence for first degree assault is 20 years' imprisonment and/or a $25,000 fine. A trial court is given wide discretion in sentencing. A sentence which is within statutory and constitutional limitations will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Janis*, 207 Neb. 491, 299 N.W.2d 447 (1980).

This is an extreme case. The assault was a savage and brutal beating which was entirely without provocation. The motive of revenge because of the victim's previous identification of the defendant as the armed robber in the 1977 offense aggravated this offense and called for a severe penalty. There was no abuse of discretion.

The judgment is affirmed.

AFFIRMED.

ACCENT SERVICE COMPANY, INC., APPELLEE, V. VIOLET EBSEN, APPELLANT.

306 N.W.2d 575

Filed June 5, 1981. No. 43353.

1. **Minors: Emancipation.** The emancipation of a child by a parent may be proved by circumstantial evidence or by an express agreement, or implied from the conduct of the parties.
2. ____: ____. Where a minor departs from the family home with parental consent, takes his personal belongings with him, thereafter furnishes his own support and receives nothing from his parent, that minor becomes emancipated, thereby relieving the parent from liability to those who furnish necessaries of life to the minor.
3. ____: ____. A parent may be held liable for necessaries of life furnished to an emancipated minor, where the parent orally or in writing agrees to the payment for such necessaries.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Reversed and remanded with directions to dismiss.

Frank Roubicek for appellant.

No appearance for appellee Accent.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and VAN PELT and CAPORALE, District Judges.

VAN PELT, District Judge.

This is an appeal from a $2,555.01 judgment of the District Court of Knox County, Nebraska, entered in favor of the plaintiff-appellee, as assignee, against the defendant-appellant for hospital expenses incurred by defendant's son. The District Court, in affirming the judgment of the county court, found that the evidence was insufficient to establish emancipation by the minor, and that the evidence did establish a contractual liability on the part of the defendant to pay for her son's medical services.

Appellant's first assignment of error is that the trial court erred in finding that there was insufficient evidence of a complete emancipation. Violet Ebsen, a widow, and her 18-year-old son, Dwaine, lived together until approximately December 1976. Dwaine then began associating and staying overnight with people his mother did not like and of whom she did not approve. Arguments over his associations and conduct took place in December of 1976 and in January of 1977. As a result of one such argument, on February 1, 1977, Dwaine took his personal belongings and moved from his mother's home in Verdigre, Nebraska, to Orchard, Nebraska. Both the mother and son agreed that he should move out and support himself. After moving out, Dwaine received no further support from his mother. On February 24, 1977, while still living in Orchard, Dwaine was shot and taken to a hospital in Norfolk, Nebraska. There, the hospital expenses were incurred that are the subject of this litigation. After being hospitalized for 2 weeks, Dwaine returned to his mother's home for 3 days and then left. He has been self-supporting and has not returned to his mother's home since leaving.

Whether Dwaine Ebsen was emancipated at the time of his hospitalization is relevant, since the complete emancipation of a child relieves the parent from liability to those who furnish necessaries of life to that child. *Brosius v. Barker*, 154 Mo. App. 657, 136 S.W. 18 (1911); *Timmerman v. Brown*, 268 S.C. 303, 233 S.E.2d 106 (1977); *Poudre Valley Hospital District v. Heckart*, 491 P.2d 984 (Colo. App. 1971).

The emancipation of a child by a parent may be proved by circumstantial evidence or by an express agreement, or implied from the conduct of the parties. *Adams & Burke Co. v. Cook*, 82 Neb. 684, 118 N.W. 662 (1908). Although this court has not had an occasion to discuss the factors to be considered in determining whether a minor has become emancipated, they were recently analyzed in Annot., 98 A.L.R. 3d 334, 335-36 (1980): "In general, even in the absence of statute, parents are under a legal as well as a moral obligation to support, maintain, and care for their children, the basis of such a duty resting not only upon the fact of the parent-child relationship, but also upon the interest of the state as parens patriae of children and of the community at large in preventing them from becoming a public burden. However, various voluntary acts of a child, such as marriage or enlistment in military service, have been held to terminate the parent's obligation of support, the issue generally being considered by the courts in terms of whether an emancipation of the child has been effectuated. In those cases involving the issue of whether a parent is obligated to support an unmarried minor child who has voluntarily left home without the consent of the parent, the courts, in actions to compel support from the parent, have uniformly held that such conduct on the part of the child terminated the support obligation.

"Correlative to a parent's obligation of support and maintenance of a minor child is the liability of a parent to others who have performed the support obligation

for the parent by furnishing the child with necessaries. Generally, a parent's liability for necessaries furnished a minor child will depend on a variety of circumstances, but it appears clear that no liability exists where the parent has been ready and willing at all times to supply necessaries himself and to otherwise fulfill his obligation to support the child. Thus, it has been held that a parent was not liable to a third person furnishing necessaries to an unmarried minor child while voluntarily living apart from the parent with consent, the courts concluding that in such a case the parent was under no obligation to support the child and that the child carried with him no authority to bind the parent for the necessaries furnished. However, a parent has been held liable for necessaries furnished his unmarried minor child by a third person while the child was living apart from the parent without consent, where there was evidence that the parent authorized the sale of the goods to the child."

Where a child departed from the family home and the parent consented to the departure, the child was found to be emancipated in *Holland v. Hartley,* 171 N.C. 376, 88 S.E. 507 (1916); in *Poudre Valley Hospital District v. Heckart, supra;* and in *Timmerman v. Brown,* 268 S.C. 303, 233 S.E.2d 106 (1977).

In the instant case, after several months of arguing and the defendant in effect telling her son to either change his behavior or move out, he left his mother's home with her consent. From that time until the hospital expense was incurred, he furnished his own support and received nothing from his mother. Under these facts, Dwaine Ebsen became emancipated, and his mother became relieved of liability to those furnishing him necessaries.

Appellant's second assignment of error is that the trial court erred in finding that there was evidence of a contractual agreement by the defendant to pay her son's hospital expenses. If such an agreement existed, defendant would be liable, regardless of her

son's emancipation, under general principles of contract law.

The county court was unable to make a finding that there was or was not a contractual agreement, but entered judgment for the plaintiff on the basis that Dwaine Ebsen was not emancipated. The District Court affirmed the judgment of the county court, with the following additional finding: "3. That Defendant authorized Plaintiff's assignor to furnish medical services of an emergency nature to her minor son, Dwaine Ebsen, orally and by the execution of Exhibit '3' in writing, immediately prior to the furnishing of the first of said services."

Exhibit 3, referred to, is a consent to operation, anesthetics, and other medical services. This document contains no language of a promise, express or implied, to pay for the services. Lucille Loberg, the hospital employee who was present when the defendant signed exhibit 3, testified that normally the hospital uses another document which specifies how the bill is to be paid. However, no such document signed by the defendant was ever produced or received in evidence.

Nor does the record reveal any oral promise to pay the hospital expenses. The closest testimony to such a promise was in the county court, where the defendant, under examination by the plaintiff's attorney, stated that by signing exhibit 3 she wanted her son attended to and wanted him to stay alive. Under examination by her own attorney, she testified that at no time did she say anything to anyone at the hospital that she could or would pay the bill. Plaintiff has the burden of proving any oral or written agreement by a preponderance of the evidence. There is no such evidence in the record.

It should be noted that as to both assignments of error it is difficult to ascertain the plaintiff's exact position, since it filed no brief in this court and did not appear at oral argument. For the reasons set forth above, the order and judgment of the District Court

are reversed, and the cause is remanded with directions to dismiss plaintiff's petition and cause of action, at plaintiff's costs.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

LAGORD ASSOCIATES, A PARTNERSHIP, APPELLANT, V. COUNTY OF CASS, NEBRASKA, APPELLEE.

306 N.W.2d 578

Filed June 5, 1981. No. 43362.

1. **Taxation: Valuation.** Neb. Rev. Stat. § 77-112 (Reissue 1976) does not require the taxing authorities to utilize all the factors set forth therein in ascertaining the actual value of property for taxation. Instead, they may use such factors or a combination thereof which are determined to be applicable in determining actual value under the Constitution of Nebraska.
2. **Taxation: Valuation: Appeal and Error.** In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low.
3. ____:____:____. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

Robert C. Doyle of Walsh, Walentine, Miles, Fullenkamp & O'Toole for appellant.

Ronald D. Moravec, Cass County Attorney, for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and VAN PELT and CAPORALE, District Judges.

VAN PELT, District Judge.

This is an appeal by the plaintiff taxpayer from an order of the Cass County District Court which affirmed the assessment of plaintiff's property made by the Cass County Board of Equalization. The plaintiff owns the Nottingham Court apartments, a 48-unit complex near Plattsmouth. The actual value of this property for tax purposes in 1978 was $315,000. The Cass County assessor revalued the property as of January 1, 1979, at $739,425. The State Board of Equalization and Assessment increased all Cass County property an additional 9 percent, raising the actual value for tax purposes of the subject property to $805,975.

Plaintiff's principal contention on appeal is that the county board's action was grossly excessive, arbitrary, and unreasonable since it relied solely on reproduction cost less depreciation, plus a gross rent multiplier, and overlooked the six other factors specified in Neb. Rev. Stat. § 77-112 (Reissue 1976). Particularly, plaintiff contends that earning capacity and relative location should have been considered.

The plaintiff's expert witness testified to an opinion of $500,000 to $550,000, utilizing the factors suggested by plaintiff. Plaintiff additionally relies upon the testimony of the County's expert that, utilizing an earning capacity valuation, the property would be worth $403,000. Under the income approach, the plaintiff's expert arrived at a value of $438,000.

The County argues that a valuation utilizing reproduction cost less depreciation is the most reasonable for this property, and that comparable sales of units in Plattsmouth substantiate the assessed value. The plaintiff's expert agreed, respecting the comparables, testifying to a market value of between $658,000 and $781,000. The County further contends that the earning

capacity approach relied on by the plaintiff is suspect because of evidentiary conflicts regarding occupancy. Finally, it asserts that the assessment utilized on the subject property is consistent with the methods used on all other property within Cass County. Section 77-112 provides: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property." Nothing in the above statute requires the county assessor or county board to use all of the factors set forth therein. Instead, they may use such factors or a combination thereof which they determine to be applicable in determining actual value under the Constitution of Nebraska. See *County of Gage v. State Board of Equalization and Assessment*, 185 Neb. 749, 178 N.W.2d 759 (1970).

In *Bumgarner v. County of Valley*, 208 Neb. 361, 365-66, 303 N.W.2d 307, 310 (1981), this court recently summarized the law applicable to this case as follows:

"While an appeal from a county board of equalization is heard as in equity and is tried de novo, Neb. Rev. Stat. § 77-1511 (Reissue 1976) requires that: 'The court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low.'

"In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear

and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. *Hastings Building Co. v. Board of Equalization*, 190 Neb. 63, 206 N.W.2d 338 (1973).

"This court has consistently reaffirmed the principles set out in *Newman v. County of Dawson*, 167 Neb. 666, 672, 94 N.W.2d 47, 50 (1959), where we said: 'It has been frequently recognized by this court that absolute or perfect equality and uniformity in taxation cannot be attained. Something more than a difference of opinion must be shown. It must be demonstrated by evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious, or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties. Mere errors of judgment do not sustain a claim of discrimination. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.' See, also, *Nash Finch Co. v. County Board of Equalization*, 191 Neb. 645, 217 N.W.2d 170 (1974)."

The evidence in the record fails to establish that the action of the Cass County board was unreasonable or arbitrary. Nor does the record show by clear and convincing evidence that the valuation, when compared with valuations placed on other similar property, is grossly excessive and the result of a systematic exercise of intentional will or failure of a plain duty. The record simply reflects a difference of opinion as to

value. The judgment of the District Court affirming the board's action was correct and it is, therefore, affirmed.

AFFIRMED.

NORMA DANNER, APPELLANT, V. MYOTT PARK, LTD., APPELLEE.

306 N.W.2d 580

Filed June 5, 1981. No. 43401.

1. **Trial: Jury Instructions.** Jury instruction that a landlord may, in the absence of unusual circumstances, if any it finds, without violating its duty to exercise reasonable care for the safety of a tenant or a tenant's visitors, await the end of a snowstorm and a reasonable time thereafter before removing ice and/or snow from outside entrances, walks, platforms, or steps, *disapproved.*
2. ____: ____. A jury instruction which misstates issues or defenses and has a tendency to confuse the jury is erroneous.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for new trial.

John J. Hanley for appellant.

Ronald H. Stave and J. Michael Coffey of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

MORAN, District Judge.

This is an appeal by the plaintiff, Norma Danner, from a judgment for the defendant, Myott Park, Ltd., a limited partnership, entered on a jury verdict in a personal injury case. Plaintiff's motion for a new trial was overruled.

The principal error assigned is on an instruction given by the trial court.

Plaintiff was an overnight guest in her daughter's apartment in the 217-unit Myott Park apartment complex in Omaha, Nebraska, owned by the defendant. The complex was of wood frame construction. Wood stairways with wood railings provided the only access to the apartment. The stairway was open to the elements, and the steps (described as steep) rose from ground level to a landing which served two apartments. Plaintiff, age 43, arrived at the apartment the evening of November 8, 1977. She recalled that it could have been raining. Climatological data from Eppley Airfield disclosed rain at midnight and snow and blowing snow at successive 3-hour intervals until noon of November 9th. Winds during that time varied from 17 to 25 knots per hour and the temperature dropped from 40 degrees at midnight to 33 degrees at noon. Plaintiff left the apartment at 2:30 p.m. on November 9th to telephone her employer to determine whether she should report for work because of the weather. Friends, who by prearrangement were to pick her up to take her to work, arrived at the apartment parking lot, and one saw her "flying through the air" down the stairway. She landed in a sitting position at the foot of the stairway and was injured. Witnesses described the stairway and railings as snowy and icy. Plaintiff testified she never looked outside before leaving the apartment but learned of the snow from television news reports. Schools were closed that day. She was familiar with the steps. She did not look down as she proceeded down the stairway. The resident manager testified it was snowing when she arrived for work shortly before 9 a.m. on November 9th. Winds were high and the snow was beginning to drift. Snow continued until sometime after 2 p.m. When the manager arrived for work she began removing snow around the office. By 9 a.m. the entire three-man maintenance crew was shoveling snow. A maintenance employee testified he salted the steps with chemical melt in the morning between 9:45 and 11:30 a.m. The manager testified that she observed the steps in

question that day, that they had been shoveled, and that she ordered the application of chemical melt after the shoveling of the steps. She did not verify compliance with her order. The witnesses who came to pick up plaintiff testified it was not snowing when they arrived at the complex. One witness returned the following day and photographed the stairway. Two photographs were in evidence. Snow is visible on the lower steps. Small patches of snow appear on the upper steps. He testified that the scene depicted was at least as bad as it was the day earlier at the time of the fall. The other witness testified the scene substantially reflected the condition at the time of the accident. The apartment lease included the requirement in Neb. Rev. Stat. § 76-1419 (1) (c) (Reissue 1976) that the landlord keep all common areas of the premises in a clean, safe condition.

The trial court instructed the jury on issues of negligence and contributory negligence. Instruction No. 8 reads:

"Where a landlord reserves a portion of the leased premises for the common use of its tenants, the landlord is required to keep the portion so reserved in a reasonably safe condition for its tenants and their visitors.

"A landlord is not subject to liability for bodily harm to its tenants' visitors on account of a condition of that part of the premises used in common by its tenants and under the landlord's possession and control unless:

"1. The condition created an unreasonable risk of harm to its tenants and their visitors; and

"2. The landlord knew, or in the exercise of reasonable care should have known, of the dangerous condition and the risk involved therein; and

"3. The landlord was afforded a reasonable time within which to make the condition safe or to give to its tenants and their visitors adequate warning to enable such persons to avoid harm; and

"4. The landlord in the exercise of reasonable care could have made the condition safe.

"As used in this instruction, the term 'unreasonable

risk of harm' means a risk that a reasonable person, under all the circumstances of the case, would not allow to continue."

This instruction was approved in *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964). Compare Restatement (Second) of Property § 17.3 (1977).

The error assigned in this court is in giving instruction No. 9 which was the trial court's modification of a similar instruction requested by defendant. Instruction No. 9 reads: "You are instructed that a landlord may, in the absence of unusual circumstances, if any you find, without violating its duty to exercise reasonable care for the safety of a tenant or a tenant's visitors, await the end of a snow storm and a reasonable time thereafter before removing ice and/or snow from outside entrances, walks, platforms or steps."

It is apparent that this instruction takes from the jury a factor which it might consider in paragraph 3 of instruction No. 8.

Plaintiff's theory is that defendant either failed to adequately clean the stairway or overlooked it in its snow- and ice-cleaning operations. Defendant contends that it cleaned the stairway. It is possible that additional snow accumulated after the stairway was cleared. If so, defendant contends that it was proper to give instruction No. 9. It is difficult to understand how this instruction could apply to the facts here because all of the evidence is that defendant began clearing operations at 9 a.m.

The propriety of the challenged instruction has never been before the court in the past. The weight of authority appears to support it. See *Mattson v. St. Luke's Hospital*, 252 Minn. 230, 89 N.W.2d 743 (1958).

We believe, however, that the instruction creates more problems than it purports to solve. The jury was adequately instructed in this respect in paragraph 3 of instruction 8. It was for the jury to determine under the evidence whether defendant was afforded a reasonable time to make the condition safe or give adequate warn-

ing. One does not have to reflect long to think of situations where giving the challenged instruction results in injustice. This was the position of the court in *Cramer v. Van Parys*, 7 Wash. App. 584, 500 P.2d 1255 (1972), where it affirmed the trial court's refusal to give the jury a similar instruction. In that case the court said at 593, 500 P.2d at 1262: "Whether a landlord was negligent in failing to remove snow from common areas is best left to the jury. In weighing the relevant circumstances, a jury might consider the nature and size of the apartment, the age and number of tenants expected to use the slippery area, the size of the area in need of cleaning, the current and anticipated weather conditions and the practicality of other safety measures or methods of ingress and egress. In weighing these factors, a jury might hold the urban landlord of a large building to a different standard of care than the rural landlord of a small building who does not live in the building. To permit any landlord under any circumstance to always wait until the end of a storm before removing snow would create a rigidity in the law inconsistent with the innumerable variables that are possible."

Defendant distinguishes the *Cramer* case because the instruction here added the phrase "in the absence of unusual circumstances, if any you find." One may inquire what are unusual circumstances, and should not a trial court define them. Circumstances are what a jury considers when determining the reasonableness of conduct.

We disapprove of the instruction. Giving it in this case was particularly prejudicial because the jury could have found that improper clearing of snow and ice, or overlooking the cleaning of the stairs, was of no consequence because defendant had a right to wait until the end of the storm before doing anything at all.

We have held that a jury instruction which misstates issues or defenses and has a tendency to confuse the jury is erroneous. *Bartels v. Retail Credit Co.*, 185 Neb.

304, 175 N.W.2d 292 (1970); *Zimmerman v. Continental Cas. Co.*, 181 Neb. 654, 150 N.W.2d 268 (1967).

Defendant contends that in any event it was entitled to a directed verdict in its favor under principles announced in *Nance v. Ames Plaza, Inc.*, 177 Neb. 88, 128 N.W.2d 564 (1964), in that the plaintiff had knowledge or should have had knowledge of the condition comparable to that of the defendant, and thus the defendant could not be guilty of negligence. This case is distinguishable. Here, plaintiff had no choice but to use the only means available to leave the apartment. As her daughter's guest, plaintiff had the right to assume that defendant would comply with its contractual duty to keep the common stairway in a clean, safe condition. *Robinson v. Belmont Co.*, 94 Colo. 534, 31 P.2d 918 (1934).

During oral argument, defendant abandoned its claim that plaintiff was contributorily negligent as a matter of law.

REVERSED AND REMANDED FOR A NEW TRIAL.

SANITARY AND IMPROVEMENT DISTRICT NO. 1 OF ADAMS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, ET AL., APPELLANTS, V. COUNTY OF ADAMS, NEBRASKA, APPELLEE.

306 N.W.2d 584

Filed June 5, 1981. No. 43426.

1. **Statutes.** Statutes in pari materia must be construed together.
2. ____. An independent legislative act covering the entire subject of legislation to which it relates may incidentally modify or change existing statutes without referring to them.
3. ____. Where a general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be

construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Brock & Seiler for appellants.

Arthur C. Toogood, Adams County Attorney, for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN and NORTON, District Judges.

NORTON, District Judge.

This is an appeal from a declaratory judgment proceeding in the District Court of Adams County, Nebraska.

Plaintiffs are Sanitary and Improvement District No. 1 of Adams County, Nebraska, a political subdivision, and Robert Trenchard, Robert Hardin, Vance Anderson, Donald L. Brock, and Frank Boyd, trustees of the sanitary and improvement district and landowners of Adams County, Nebraska, all of whom are hereinafter referred to as SID No. 1. The defendant is the County of Adams, Nebraska, hereinafter referred to as County.

SID No. 1 was organized during the year 1964, pursuant to the provisions of Neb. Rev. Stat. §§ 31-727 through 31-762 (Reissue 1978), as amended. Subsequent to its organization, a plat of the district was filed with the register of deeds of Adams County, Nebraska, declaring all streets contained therein to be public. In reality, SID No. 1 contains only two streets involved in this controversy, Highland Drive and Madden Road. On September 8, 1976, the County notified SID No. 1 that it would remove snow from the two streets mentioned for a fee of $100 per year; and, on February 27, 1979, the County adopted a resolution stating in substance that SID No. 1 would be required to pay for maintenance, grading, snow removal, and culvert work on said streets effective July 1, 1979. This action resulted. The issue

presented to the trial court was whether or not the evidence was sufficient to declare the County responsible for maintenance, grading, snow removal, and culvert work on said streets. The trial court found for the defendant. We affirm.

The sole issue for consideration on this appeal is the responsibility of Adams County for maintenance, grading, snow removal, and culvert work performed within the boundaries of SID No. 1 under the circumstances of this case.

SID No. 1 argues in substance that the streets in question are roads rural in nature, open to the public, designated mail routes, and thereby part of the primary road system of the County; further, that Neb. Rev. Stat. § 39-1402 (Reissue 1978) vests the power and authority to maintain public roads in the County, and that Neb. Rev. Stat. §§ 39-2001(1) and 39-2003 (Reissue 1978) require the County to maintain at its expense all county roads which fall into the classification of primary roads. The counterargument of the County in substance is that there is a special act dealing with sanitary and improvement districts, and the construction, improvement, and maintenance of the streets or roads contained therein; that there is no indication in that act that the Legislature intended to impose this burden upon any county which might be involved; that the statutes referred to by SID No. 1 are general statutes; and that where special acts exist they are to be considered an exception to general legislation dealing with the same subject matter, unless that special act is repealed in express words or by necessary implication. The County further argues that a county can exercise only such powers as are expressly conferred upon it, and any reasonable doubt as to a grant of power must be resolved against it.

The evidence presented to the trial court would show that the streets in question were open and used by the public, and were rural in nature. Moreover, the evidence indicates that the State of Nebraska has in the

past included said streets in establishing the factor for allocation of road funds in Adams County, and that the County has collected funds from the state on the basis of the factor established. There is some conflict surrounding the matter of how the streets became mail route roads. The County admits they have been so designated by the U.S. Post Office; and the minutes of a meeting of the board of the County held on or about September 8, 1976, contain the following brief statement in regard to said streets: "Said roads are presently mail route roads." The record is silent as to whether the County has ever made an official designation as to the classification of said streets as is required in §§ 39-2001 through 39-2003. The uncertainty on the latter two points is not material to a decision in this case.

Article 7 of Chapter 31 is devoted entirely to the subject of sanitary and improvement districts. It is divided into five portions, part two of which contains §§ 31-727 through 31-762, dealing with districts formed under the act of 1949. By the terms of this act and these particular sections, sanitary and improvement districts may be formed for various purposes, including the installation of "a system of sidewalks, public roads, streets, and highways . . . ." § 31-727. The act also provides that the board of trustees of any district shall have the power to provide "for establishing, maintaining, and constructing sidewalks, public roads, streets, and highways, including the grading, changing grade, paving, repaving, graveling, regraveling, widening or narrowing roads, resurfacing or relaying existing pavement, or otherwise improving any road, street, or highway within the district . . . ." § 31-740. Further, this act provides that the district may borrow money for its corporate purposes and issue general obligation bonds, and that it "*shall* annually levy a tax on the assessed value of all the taxable property in the district, except intangible property, sufficient to pay . . . for the maintenance and repairing of any sidewalks, public roads, streets, and highways

. . . ." (Emphasis supplied.) § 31-739.

In its petition for creation SID No. 1 prayed for an order finding that it had been duly organized and entitled to exercise *all* rights, powers, and privileges granted by law to districts organized under §§ 31-727 through 31-762. Attached to the petition are the articles of incorporation. Article VII thereof states that one of the purposes of SID No. 1 shall be "installing a system of public roads, streets, and highways . . . ." and that the board of trustees shall be invested with power "for establishing, maintaining and constructing of public roads, streets, and highways, including the grading, changing grades, paving, repairing, graveling, regraveling, widening or narrowing of roads, resurfacing or relaying existing pavement, or otherwise improving any road, street, or highway within the district . . . ." By Article VIII, the owners are obligated "to pay the tax or taxes which may be levied . . . and . . . assessed against them, to pay the expenses which may be necessary . . . [for] the cost of grading, changing grade, paving, repairing, graveling, regraveling, widening or narrowing roads, resurfacing or relaying existing pavement, or otherwise improving any public roads, streets, or highways within the district . . . ." On May 8, 1964, a decree was entered in the District Court of Adams County, Nebraska, approving the organization of SID No. 1 under the proposed articles. No appeal was taken and this order became final. Thereafter, bonds were issued in the manner provided by law for various purposes, including street improvements, and special assessments were levied for the repayment of the same.

In giving effect to the intent of the Legislature in the adoption of legislation, this court has stated that statutes in pari materia must be construed together. *State v. Howard*, 193 Neb. 45, 225 N.W.2d 391 (1975). The court has further stated: "'An independent legislative act covering the entire subject of legislation to which it relates may incidentally modify or change existing statutes without referring to them.'" *Thompson*

v. Commercial Credit Equipment Corp., 169 Neb. 377, 386, 99 N.W.2d 761, 767 (1959). "'[W]here the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.'" *Id.* at 387, 99 N.W.2d 761, 768.

There can be no question that article 7 of Chapter 31, while adopted at various times, is a special, independent legislative act in itself, intended to cover the entire subject of sanitary and improvement districts in this state. It contains broad provisions conveying powers which include those intended to deal with the matter of the construction, improvement, and maintenance of roads within the districts.

An examination of the general statutes cited by the parties and of the special act discloses no language which would repeal, either expressly or by implication, the plain language of all legislation under consideration. Therefore, in adopting the act in question, the Legislature has in effect created an exception to the general statutes dealing with the responsibility of counties to provide for the construction, improvement, and maintenance of roads within districts legally organized for those purposes. It is noted that one of the specific purposes of SID No. 1 was to provide public streets and highways. The evidence discloses that the board, acting under powers granted to it, did in fact construct the streets in question. The act then imposes an affirmative duty upon the board to levy a tax to pay for those very items which SID No. 1 now wishes to transfer to the County. The existence of that duty indicates without question that these responsibilities are

solely those of SID No. 1.

We are not prepared to say that under circumstances different from this case some responsibility might arise on the part of a county for the maintenance and improvement of roads within a sanitary and improvement district. However, in the instant case the evidence before the trial court and this court does not disclose any circumstances imposing an obligation on the part of Adams County, and is therefore insufficient to support the claim of SID No. 1.

The judgment of the District Court is affirmed.

AFFIRMED.

CHRISTOPHER L. OTTO, APPELLANT, V. LEE HAHN, APPELLEE.

306 N.W.2d 587

Filed June 5, 1981. No. 43504.

1. **Workmen's Compensation.** The whole character of the employment must be considered to determine whether an employee is a farm laborer within the meaning of the Workmen's Compensation Act.
2. **Legislative Intent.** When interpreting legislative acts we are concerned with the intent of the Legislature in adopting the same.
3. ——. In determining that intent, we consider the history of the legislation and weigh a reasonable interpretation against an unreasonable or absurd construction.
4. **Legislative Intent: Constitutional Law.** When the Legislature chooses to inaugurate reforms in the area of economics or social welfare, it is not required to make the choice between attacking every aspect of a problem or not attacking the problem at all, as long as the action has a rational basis and is free from invidious discrimination.
5. **Workmen's Compensation: Constitutional Law: Proof.** The one attacking the exemption of farm laborers from the provisions of the Workmen's Compensation Act as a violation of equal protection has the burden of proving that there is no rational basis for the classification.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Law Offices of Kenneth Cobb, P.C., and John B.

McCauley and Law Office of Lynn D. Hutton, Jr., P.C., for appellant.

James G. Egley of Moyer, Moyer & Egley for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

The appellant, Christopher L. Otto, has appealed from an order of the Workmen's Compensation Court dismissing his petition for disability benefits. The one-judge Workmen's Compensation Court found that Otto was an exempt farm laborer and was therefore not entitled to benefits under the Workmen's Compensation Act. Upon rehearing by a three-judge panel, pursuant to Neb. Rev. Stat. § 48-179 (Reissue 1978), the original order was affirmed and the petition dismissed. The appellant assigns as error the failure to award compensation, the failure to find that farming is a hazardous occupation, and the refusal of the court to declare the farm laborer exemption in violation of the fourteenth amendment of the U.S. Constitution. We affirm.

Christopher Otto was a full-time employee of the defendant, Lee Hahn, and was the victim of an accident which occurred while Otto was tearing out some steps leading to the defendant's farmhouse. While pulling a nail out of the steps with a flat bar, the nail broke off and flew up and struck Otto in the right eye. As a result of the accident the retina became detached, and as of January of 1980 the vision in Otto's right eye was limited to light perception.

The duties of the appellant's employment included cleaning pigpens, feeding cattle and pigs, plowing, disking, building fences and pens, and various miscellaneous jobs on the farm. Otto worked approximately 45 hours per week, and worked only for the defendant on his farm and at no other location.

It is well established that a workman is not a farm laborer simply because he is doing work on a farm, nor

because the task on which he is engaged happens to be what is ordinarily considered farm labor. The whole character of the employment must be considered to determine whether he is a farm laborer. *Campos v. Tomoi*, 175 Neb. 555, 122 N.W.2d 473 (1963); *Hawthorne v. Hawthorne*, 184 Neb. 372, 167 N.W.2d 564 (1969). A review of the whole character of Otto's employment supports the conclusion that he is a farm laborer within the meaning of the Workmen's Compensation Act.

Employers of farm laborers have been exempted from the act since its inception. "(2) The following are declared not to be hazardous occupations and not within the provisions of this act: Employers of household domestic servants and employers of farm or ranch laborers . . . ." Neb. Rev. Stat. § 48-106(2) (Reissue 1978).

The appellant argues that the classification of farming as a nonhazardous occupation is unreasonable and arbitrary and therefore a violation of the equal protection clause of the fourteenth amendment. Evidence was presented to prove that farming is one of the most hazardous occupations existing today. The appellant contends that the character of farming has changed since the early part of this century when the Workmen's Compensation Act was first adopted, and the classification of farming as nonhazardous may have been reasonable then, but by present standards it is unjustified.

What legislative history we have been able to find indicates that the Legislature never made a legislative finding that farming is nonhazardous. It appears that the description in the exclusion was merely the result of bill drafting and various amendments. "SECTION 1. The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. . . . SEC. 2 *There is a hazard in all employment*, but certain employments have come to be, and are recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations . . . ." House Roll No. 193, pp. 1-2,

Thirty-third Session, 1913. (Emphasis supplied.) The bill went further and listed specifically all such extra-hazardous occupations. The Senate bill as introduced was in the same language. Senate File No. 1, pp. 1-2, Thirty-third Session, 1913. The latter bill was amended to even more exhaustively enumerate the occupations to which the act was to apply, with the result being a list of vocations one and one-half single-spaced legal sized pages long. Committee of the Whole Amendments, Senate File No. 1, April 4, 1913. The bill was again amended by a House Committee, and the result, which more nearly resembles the current statute, removed the long list of occupations and substituted the following:

"Sec. 6. (1). The provisions of this act shall apply to the State of Nebraska and every governmental agency created by it, and every employer in this state employing five or more employees, in the regular trade, business, profession or vocation of such employer.

"(2). The following are declared not to be hazardous occupations and not within the provisions of this act; employers of household domestic servants, employers of farm laborers and all employers employing less than five employees, in the regular trade, business, profession or vocation of such employer . . . ." House Committe of the Whole Amendments to Senate File No. 1, Thirty-third Session, April 14, 1913.

It appears that the use of the term "hazardous" in the amendment relates back to the intent of the legislators to cover employments considered to be inherently constantly dangerous. Certain employments were intended to come within the provisions of the act and others were intended to be excluded. In order to shorten the list of included occupations, the legislators decided to include all employers with certain exceptions. It is unfortunate that they used the term "not hazardous" in the exclusion, since they clearly recognized that there is a hazard in all employment. It is equally clear that they did not intend to extend the provisions of the act to employers of domestic servants, employers of farm la-

borers, and all employers employing less than five employees in any other vocation. It would, of course, be ridiculous to assume that the Legislature believed that there is a hazard where five employees work, and there is no hazard where only four are working on the identical job.

"It is the intent of the Legislature with which we are here concerned. In determining that intent, we consider the history of the legislation and the reasonableness of an interpretation when weighed against an unreasonable or absurd construction evidently not intended by the Legislature." *Johnson v. School Dist. of Wakefield*, 181 Neb. 372, 376, 148 N.W.2d 592, 595 (1967).

It becomes apparent that farm laborers were excluded from the act not because farming is nonhazardous but because the Legislature chose not to extend the coverage of the act to that class for a possibly political or social reason. The question we must decide is not whether the legislative classification of farm labor as "nonhazardous" is unreasonable, but whether the Legislature can exempt farm laborers as a class from the act without contravening the equal protection clause of the fourteenth amendment.

The classification is tested by the standard of *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970): "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to

justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426."

The equal protection clause does not require the Legislature to choose between attacking every aspect of a problem or not attacking the problem at all; it is sufficient if the action taken is rationally based and free from invidious discrimination. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). "Refined analysis and simplistic logic when applied to the practical impact of a particular classification produces many times an appearance of inequality and discrimination. This is especially true close to the borderlines. But the sharpness of the lines drawn does not create an irrationality of classification or an invidious discrimination. This is particularly true when the sword of legislative policy deals with broad problems of economics and social welfare." *Thompson v. Board of Regents of University of Nebraska*, 187 Neb. 252, 256, 188 N.W.2d 840, 843 (1971).

In every constitutional challenge there attaches the presumption that all acts of the Legislature are constitutional with all reasonable doubts resolved in favor of constitutionality. *American Fed. of S., C. & M. Emp. v. Dept. of Public Institutions*, 195 Neb. 253, 237 N.W.2d 841 (1976). In reviewing the statute we do not pass judgment on the wisdom or the necessity of the legislation, nor whether the statute is based upon assumptions which are scientifically substantiated. Even misguided laws may nevertheless be constitutional. *Stoehr v. Whipple*, 405 F. Supp. 1249 (D. Neb. 1976).

The appellant cites, as support for the proposition that the farm labor exemption is a denial of equal protection, *Gallegos v. Glaser Crandell Co.*, 388 Mich. 654, 202 N.W.2d 786 (1972). The Michigan Supreme Court determined that the classification of agricultural employers for different treatment under the Michigan Workmen's Compensation Act is a violation of the equal protection clause. We do not find that holding particularly persuasive, especially since the Michigan act does not exclude all agricultural workers, but makes distinc-

tions based upon those agricultural workers who are paid on a piecework basis and those who do not work 35 or more hours per week for the same employer for 13 or more consecutive weeks. That decision has not, as some commentators expected, started a trend toward invalidating agricultural exemptions. 1C Larson, Workmen's Compensation Law § 53.10, n. 84 (1981); Note, *Workmen's Compensation Laws and Equal Protection: Does GALLEGOS Portend the Demise of the Agricultural Exclusion?* 1973 Duke L.J. 705.

The appellant further cites *Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96 (N.D. 1979), which agreed with the trial court's conclusion that the exclusion of agricultural employees from the benefits of the Workmen's Compensation Act was unreasonable and contrary to the expressed purpose of the act. Although the court affirmed the award of benefits to Benson, an agricultural employee, it was unable to declare the agricultural exclusion unconstitutional because it failed to have a concurrence of four members of that court.

A challenge similar to the case at bar was presented to the Supreme Court of Montana in *State ex rel. Hammond v. Hager*, 160 Mont. 391, 503 P.2d 52 (1972). That court discussed the various reasons that its legislature may have had for the agriculture exclusion and determined that the petitioner had not met his burden to negative every conceivable basis which might support the legislative action. The claimant in the case of *Anaya, Jr. v. Indust. Comm.*, 182 Colo. 244, 247, 512 P.2d 625, 626 (1973), met the same fate: "It is not our province to comment on the logic or policy of the General Assembly in making this exclusion. Rather, our duty is to determine whether there is a reasonable basis for this classification. We think there is and, at least, with a presumption of constitutionality, the petitioner has failed to overcome that presumption."

Even more recently the New Mexico Court of Appeals was called upon to interpret the scope of the farm and ranch workers' exemption to the Workmen's Compensa-

tion Act. "Cueto also seems to argue that the exemption denies him equal protection. It does not; the exemption is not arbitrary, but has a reasonable basis." *Cueto v. Stahmann Farms, Inc.*, 94 N.M. 223, 224, 608 P.2d 535, 536 (1980).

A parallel can be found in federal case law which involves the agricultural exclusion from the unemployment compensation laws. There the exclusion has also been held to be constitutional.

"When the legislature chooses to inaugurate a reform as sweeping as that which is represented by unemployment compensation, it is often forced to make compromises which, whether in the name of politics or economy, are often impossible of explanation in strictly legal terms. Realizing this, the Courts have refused to require that the State remedy all aspects of a particular mischief or none at all. [Citations omitted.] Hence the exclusion of agriculture from unemployment compensation can be seen as an indirect subsidy of a 'beneficent enterprise', or as an effort to save the compensation fund from the drain which would result from the inclusion of another large 'deficit industry', or even as a necessary political compromise without which it would have been impossible to inaugurate a most important reform in American institutions. Whether all of this is good policy is of course not the question before us. We can only ask if these justifications are rational by the loose standards of *Carmichael, Steward Machine*, and *Dandridge*, cit. *supra*. We conclude that they are." *Romero v. Hodgson*, 319 F. Supp. 1201, 1203 (N.D. Cal. 1970), *aff'd*, 403 U.S. 901, 91 S. Ct. 2215, 29 L. Ed. 2d 678 (1971).

Romero was treated as controlling precedent in *Doe v. Hodgson*, 344 F. Supp. 964 (S.D.N.Y. 1972). The latter case was an action brought by nine agricultural laborers challenging the constitutionality of certain federal and state legislations' exclusions of benefits and protection from agricultural workers. Five federal officials and three state officials were named as defendants, including the chairman of the Workmen's Compensation Board. The court determined that *Romero* was control-

ling even though the challenge in the earlier case was limited to unemployment compensation. The tax scheme is the same and "the court perceives . . . no sound basis for reconsidering at this level a recent decision of the Supreme Court following the thus far settled course of adjudging statutes singly, with an eye to their distinct rationales and asserted justifications, for purposes of constitutional tests." *Doe* at 968.

We therefore conclude that in the area of economics and social welfare the Legislature is not required to make the choice between attacking every aspect of a problem or not attacking the problem at all, as long as the action has a rational basis and is free from invidious discrimination. The appellant has not met his burden of proving that there is no rational basis for the classification of farm labor employers, and has not overcome the presumption of constitutionality. The judgment of the Workmen's Compensation Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES H. SHARSKI, APPELLANT.

306 N.W.2d 592

Filed June 5, 1981. No. 43565.

1. **Criminal Attempt: Indictments and Informations.** In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal.
2. **Statutes: Constitutional Law: Appeal and Error.** For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court.
3. **Statutes.** Difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed as modified.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein for appellant.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

Heard before KRIVOSHA, C.J. BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Charles H. Sharski, the defendant and appellant herein, appeals to this court from his conviction in the District Court of Douglas County, Nebraska, of the charge of attempted second degree arson, in violation of Neb. Rev. Stat. § 28-201 (Reissue 1979). The case was tried before a jury on April 16, 1980, which found the defendant guilty of the attempted second degree arson of the Quebec Lounge in Omaha, Nebraska. The court sentenced Sharski to a term of 2 to 4 years' imprisonment in the Nebraska Penal and Correctional Complex. We affirm as modified.

By way of factual background, it appears that on the evening of February 7, 1980, at approximately 7:30 p.m., the defendant accompanied his roommate, Terry Lytle, to the Quebec Lounge. While they were at the establishment, Sharski and Lytle consumed several pitchers of beer and several "shots" of schnapps. At approximately 12:45 a.m., an altercation broke out between Sharski, his roommate, and the owner of the lounge, Robert Dempsey, who testified that Sharski and Lytle had been harrassing employees of the lounge. The altercation terminated quickly, however, and Sharski and Lytle were ejected from the lounge.

Dempsey testified that he remained at the lounge after its normal closing hour in order to install a water heater in the basement of the building. He stated that at approximately 3 a.m., when looking for some tools which were kept behind the bar, he heard a noise emanating from outside the west side of the building. Dempsey investigated the noise, and he observed through a

nearby window an individual who was holding a pop bottle which had a rag inserted in the top. The individual was attempting to ignite the rag with a lighter held in the other hand. Dempsey knocked on the window pane, at which time the individual, later identified as the defendant, dropped the bottle and fled from the scene. Subsequently, it was discovered that the bottle contained gasoline, and the defendant was apprehended.

In his brief on appeal, Sharski makes the following assignments of error: (1) That the District Court erred in adjudging him guilty on an information which failed to charge the essential statutory elements of attempted second degree arson; (2) That the statute defining criminal attempt was unconstitutionally vague; and (3) That the sentence imposed by the court exceeded permissible statutory limits and should be reduced.

The information which charged the defendant alleged in part as follows: "Charles H. Sharski late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska aforesaid, then and there being, did then and there intentionally attempt to damage a building by starting a fire or causing an explosion, said building being located at 4830 Ames Avenue in the City of Omaha, Douglas County, Nebraska, being occupied by Quebec Lounge, said property being owned by Robert Dempsey . . . ."

This court has recently had the opportunity to review the general criminal attempt statute embodied in § 28-201, which states:

"(1) A person shall be guilty of an attempt to commit a crime if he: (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

"(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to com-

mit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

"(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent."

In *State v. Sodders*, 208 Neb. 504, 510, 304 N.W.2d 62, 66 (1981), we stated that "in the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal." See, also, *State v. Meredith*, 208 Neb. 637, 304 N.W.2d 926 (1981). In the present case, no motion to quash was ever filed by the defendant, and we determine that the information is adequate to withstand the jurisdictional attack defendant raises for the first time on appeal.

We now address defendant's claim that the aforementioned criminal attempt statute is unconstitutionally vague. We note at the outset that this issue was not raised or presented below but, rather, is raised for the first time on appeal. The rule is well settled as follows: "For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court." *State v. McConnell*, 201 Neb. 84, 89, 266 N.W.2d 219, 221 (1978); *State v. Mayes*, 183 Neb. 165, 159 N.W.2d 203 (1968). However, even if the issue were properly before us in this appeal, we think that it is without merit. As we noted in *Sodders, supra*, at 507, 304 N.W.2d at 65, § 28-201 may be "inartfully drafted and unduly complex. However, difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous." We believe that the infor-

mation in the present case adequately informed Sharski of the crime with which he was charged.

Finally, we turn to defendant's contention that the sentence imposed by the trial court exceeds the permissible statutory limits set for indeterminate sentences. The defendant in this case was convicted of attempted second degree arson. We note that the crime of second degree arson is a Class III felony as defined under Neb. Rev. Stat. § 28-503 (Reissue 1979), and carries a statutory penalty of 1 to 20 years' imprisonment. However, under Neb. Rev. Stat. § 28-201 (4) (Reissue 1979), criminal attempt is a Class IV felony when the crime attempted is a Class III felony. The penalty for a Class IV felony under Neb. Rev. Stat. § 28-105 (Reissue 1979) is a maximum of 5 years' imprisonment, a $10,000 fine, or both, with no prescribed minimum.

The trial court sentenced the defendant to an indeterminate term of from 2 to 4 years' imprisonment. The indeterminate sentencing statute, Neb. Rev. Stat. § 83-1,105 (Reissue 1976), provides that: "[T]he minimum limit fixed by the court shall not be less than the minimum provided by law *nor more than one-third of the maximum term . . .*" (Emphasis supplied.) See, also, *State v. Suggett*, 189 Neb. 714, 204 N.W.2d 793 (1973); *State v. Miles*, 194 Neb. 128, 230 N.W.2d 227 (1975).

In the present case the minimum portion of the indeterminate sentence fixed by the court, 2 years, exceeds by 4 months the proscription of one-third of the maximum sentence of 5 years. Under § 83-1,105, as conceded by the State in its brief on appeal, defendant's minimum sentence should have been 20 months, rather than the 2 years which the trial court imposed.

Under Neb. Rev. Stat. § 29-2308 (Reissue 1979), this court is authorized to reduce the sentence imposed by the District Court when, in our opinion, the sentence is excessive. In this case, as demonstrated above, the sentence imposed on the defendant exceeded the maximum allowed minimum penalty for a Class IV

felony. The sentence imposed by the trial court must, therefore, be modified; and we determine that the minimum limit of the defendant's sentence should be 20 months' imprisonment in the Nebraska Penal and Correctional Complex, with the maximum term of the sentence to remain at 4 years.

For the reasons stated above, the judgment of the trial court must be and is hereby affirmed, and the sentence imposed is ordered modified to meet the required statutory limitations.

AFFIRMED AS MODIFIED.

KRIVOSHA, C.J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. EDWARD A. TEATER, APPELLANT.

306 N.W.2d 596

Filed June 5, 1981. No. 43666.

1. **Criminal Law: Confessions.** In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
2. **Right to Counsel: Waiver.** Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
3. **Miranda Rights.** Once *Miranda* warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.
4. **Criminal Law: Confessions.** To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Conviction and sentence vacated. Reversed and remanded.

Dennis R. Keefe, Lancaster County Public Defender, and Dennis Carlson for appellant.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant was found guilty of robbery after trial to the court without a jury and sentenced to not less than 2 years' nor more than 4 years' imprisonment.

On October 20, 1979, at about 3 p.m., a man described as approximately 6 feet tall, weighing approximately 250 pounds, and wearing a pair of greasy coveralls and a ski mask entered a service station office at 21st and Holdrege Streets in Lincoln, Nebraska, produced a gun, forced the attendant to go into the restroom, and took over $100. The attendant saw only one person, although he heard voices in the office during the course of the robbery. The police were called and the officers immediately began an investigation in the neighborhood.

At approximately 3:30 p.m. two police officers who were investigating the robbery saw the defendant, who was 6 feet tall and weighed 150 pounds, and Fred Maguire, who was 5 feet 11 inches tall and weighed 260 pounds, come out of a residence which was near the service station. The officers told the two men they were investigating the robbery and wanted to know what the men were doing. The officers asked Maguire for permission to look at a pair of coveralls in the back seat of his automobile, which was parked near the residence. Permission was given. The officers took the coveralls, and one of the officers then took Maguire to the service station where the service station attendant told them that Maguire looked like the robber. Maguire was then

placed under arrest and taken to the police station. Maguire was later charged with armed robbery, pleaded guilty to an amended charge of theft, and was sentenced to 8 months in jail.

Meanwhile, another officer asked the defendant to produce the money he had on his person. The officer took the money, and he and the defendant then waited near the police car for approximately 20 minutes. The defendant was then asked to accompany the officer to police headquarters.

Upon arriving at the police station the defendant was placed in a holding room by himself. The time was approximately 4 p.m. The evidence of the police officers was that soon after the defendant was placed in the holding room the officers read the *Miranda* rights statement to the defendant and the defendant agreed to talk to the police but denied any involvement in the robbery. The defendant completed a standard waiver form and made no request for an attorney. When the defendant denied involvement in the robbery the officers then left him alone in the holding room.

At approximately 5:20 p.m. two police officers returned to the holding room. One of the officers read to and discussed with the defendant possible charges and penalties for robbery and related crimes and told the defendant that it was the officer's opinion that it would be 10 years before the defendant would be released. The officers also admitted that there was a conversation with the defendant concerning the ages of the defendant's children, the length of possible prison terms for him, and the respective ages of his children upon release. Although the officers testified that they made no promises, threats, or inducements to the defendant to make a statement, they admitted that they told the defendant that it would be to his benefit, or better for him, if he made a statement at that time. The defendant again denied involvement in the robbery and the officers left.

Shortly before 7:30 p.m. Detective Peschong and Of-

ficer Melton entered the holding room and the defendant was asked if he had been read his *Miranda* rights, to which he responded in the affirmative. Detective Peschong then asked the defendant to sign a consent to search form giving the officers permission to search the defendant's residence, which the defendant signed. The defendant was again asked about his involvement in the crime and again denied any knowledge of the robbery. The defendant was then informed that the officers had knowledge of his involvement and that he was under arrest for the robbery. The defendant requested that the officers give back the consent to search but was told that it would not be returned. At this point the defendant invoked his rights and advised the officers that he did not wish to speak with them and that he wanted an attorney.

As the officers prepared to leave the room the defendant said something about "it wasn't supposed to be like that." The officers stopped and Detective Peschong told the defendant that he was just trying to get the incident cleared up with as little trouble as possible. The defendant did not reply and the officers then asked him if he was aware of his *Miranda* warnings and if he would be willing to go ahead and speak to them without an attorney. Upon an affirmative reply the officers then obtained an oral statement implicating the defendant in the robbery. A written statement was obtained later that night. No police officer contacted an attorney or gave the defendant an opportunity to contact an attorney at any time before a bond hearing 2 days later.

The defendant's testimony was that he was interrogated on at least two more occasions between 4 p.m. and 7:30 p.m. and that on all five occasions he had requested an attorney and the officers had responded that he would get an attorney in time. He also testified that, in addition to talking about the penalties and the defendant's children, the officers had requested him to take a polygraph test and had told him that if he passed the test he could go home. He testified that he refused and again requested a lawyer.

The defendant was charged with the robbery. A lawyer was appointed for him and the defendant entered a not guilty plea. There was a pretrial hearing on the defendant's motion to suppress the statements. The motion was overruled. The defendant waived jury trial and the case was tried to the court without a jury. The defendant did not testify at trial. The court found the defendant guilty and sentenced him to not less than 2 nor more than 4 years' imprisonment. This appeal followed.

The critical issue on this appeal is whether or not the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel within the mandates of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and whether the motion to suppress the statements should have been granted.

In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances. *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974); *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978).

The trial court in this case obviously accepted the officers' version of the facts. For that reason we have set out the facts which are undisputed or established by the testimony of the officers separately from the defendant's version. The undisputed facts establish that the defendant requested an attorney and refused to talk to the police officers without an attorney at the interrogation at approximately 7:30 p.m. on October 20, 1979. There is also no dispute that the police officers continued their efforts and obtained a statement immediately after the defendant had invoked his right to counsel and his right to remain silent simply because the defendant made a statement that "it wasn't supposed to be that way."

This court has previously set out the *Miranda*-imposed requirements on police officers when a suspect invokes

his constitutional right to remain silent and his right to counsel. In *State v. Fuller*, 203 Neb. 233, 238-39, 278 N.W.2d 756, 759-60 (1979), this court said: "Although Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), does not require an absolute halt to all conversations by the police with the defendant once the right to silence is asserted, observance of the constitutional right is tested by the circumstances to determine whether the right was 'scrupulously honored.' . . .

"Recent cases consider the validity of a subsequent waiver of the once-asserted right to counsel under certain circumstances. [Citations omitted.] These cases hold that the defendant cannot be persuaded to waive his rights and there is a strong presumption against waiver. 'If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' [Citing *Miranda v. Arizona.*]"

In *In re Interest of Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980), this court said: "Once *Miranda* warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."

To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979).

The State takes the position that a complaint by a defendant about police conduct occurring in the course of interrogation may be treated as justification for ignoring his request for counsel and his right to remain silent simply because he voices the complaint immediately after he has invoked his rights. The evidence is undisputed that the defendant's assertion of his constitutional

right to remain silent and right to counsel was not "scrupulously honored." The evidence was insufficient, as a matter of law, to meet the heavy burden resting on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. The motion to suppress should have been granted.

In view of the determination made it is unnecessary to discuss the defendant's remaining assignments of error. The conviction and sentence are vacated and the cause remanded to the District Court.

CONVICTION AND SENTENCE VACATED.
REVERSED AND REMANDED.

CLINTON and HASTINGS, JJ., concur in result.

STATE OF NEBRASKA, APPELLEE, V.
KALON D. STRICKLAND, APPELLANT.

306 N.W.2d 600

Filed June 5, 1981. No. 43620.

1. **Criminal Law: Confessions.** In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
2. **Confessions: Miranda Rights.** The admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored.
3. **Confessions: Miranda Rights: Waiver.** The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The defendant was charged with the crime of burglary and entered a plea of not guilty. Motions to suppress physical evidence and a confession were filed. Hearings were heard on these motions and the motions were overruled. The defendant then waived his right to a trial by jury and consented to be tried before the court upon documentary evidence consisting of the complete police reports of the investigation, which included the written confession. He was found guilty by the court and sentenced to a term of 2 to 3 years in the Nebraska Penal and Correctional Complex.

The sole assignment of error on appeal to this court is that the court erred in refusing to suppress the statement or confession given by the defendant to the police following his arrest.

The arguments which the defendant makes supporting the assignment of error are two. (1) Where the person in custody has, after the *Miranda* warnings have been given, initially refused to make a statement, but at a later time agrees to make a statement, then it is to be presumed that the latter waiver is involuntary and a heavy burden rests upon the State to overcome that presumption, and the State has not overcome the presumption in this case. (2) The defendant could not waive his right to remain silent in the absence of the presence of or notice to counsel.

The nature of the two assignments makes it possible to discuss them together. A review of the evidence pertinent to the issue is necessary before the governing legal principles are discussed. At about 4:30 a.m. on Saturday, July 14, 1979, police officers on patrol received radio calls indicating that a burglary had just occurred at "Canfield's," a sporting goods and

gun store located at 2415 Cuming Street in Omaha. The police had previous information of recent burglaries in which weapons were stolen, the description of an automobile believed involved in these burglaries, and an address at which the guns were being marketed, to wit, 19th and Clark Streets, Omaha, Nebraska. An eyewitness to the Canfield burglary described the automobile involved in the Canfield burglary as similar to the one involved in the other reported burglaries.

One or more police vehicles were dispatched to the 19th and Clark Streets location. A vehicle matching the description of the car believed involved was being parked and two individuals, one being the defendant, got out. The other person, a female, was seen to dispose of a handgun by dropping it. Four new shotguns, some with sales tags still on, were observed in the back seat of the automobile. The defendant was observed getting out of the car and was arrested. The shotguns were later identified as those taken in the Canfield burglary. Keys to the auto were found on the person of the female. She was also arrested. The defendant was identified by an eyewitness to the burglary as looking like the man who had entered Canfield's and removed the guns and placed them in the car.

At 6:26 a.m. at the police station, the *Miranda* warning and rights were read to the defendant by Sergeant Mohatt. The defendant answered all the questions in the affirmative except the last, as to which he answered no, i.e., he would not make a statement. The defendant did not ask for an attorney. There was no further interrogation at that time.

Some hours later on July 14, pursuant to standard practice, the *Miranda* warnings were again administered by members of the burglary unit to see if the accused had changed his mind. He had not. He did not request an attorney at that time.

On July 16 at 10:25 a.m., Sergeant Kocourek of the burglary unit again administered the *Miranda*

warnings. This time the defendant answered all of the questions in the affirmative, including the following: "Q. Knowing your rights in this matter, are you willing to make a statement to me now? A. Yes."

Defendant then gave a short written statement in which he admitted his part in the burglary and implicated the other two suspects. On Saturday morning at 8 or 8:30 a.m., a member of the Douglas County Public Defender's office, apparently pursuant to a standard practice and presumably in accordance with the duties placed upon the public defender by Neb. Rev. Stat. §§ 29-1804.03 and 29-1804.04 (Reissue 1979), appeared at the police station for the purpose of talking to all prisoners suspected of or charged with a felony. There he talked to the defendant. He told the defendant he would probably be representing him at his arraignment and twice advised him not to give the police officers any information. The testimony is that one such admonition took place within the hearing of police officers.

There is some conflicting evidence. The defendant, at the suppression hearing, testified that his decision to make a statement was induced by various threats, promises, and inducements which he claimed were made to him by various police officers. The testimony was denied by the police officers allegedly involved. Defendant also testified that he was not allowed to use the telephone from the time of the arrest until Monday afternoon. The police records indicate that all the suspects were denied telephone privileges during the initial stages of the investigation beginning at 4:30 a.m. until 3:20 p.m. on July 14, at which latter hour an order was made: "The Suspect [earlier identified in the report] Can Have Telephones." The trial judge who heard the testimony, in announcing his decision on the motion to suppress, stated that he accepted the testimony of the officers and not that of the defendant.

The defendant's counsel acknowledges that all state

and federal courts, except the state of New York, have refused to adopt a per se rule that the invocation of the right to remain silent prohibits all further questioning without the presence of counsel. Defendant relies upon *State v. Johns*, 185 Neb. 590, 597, 177 N.W.2d 580, 585 (1970), where we said: "Repetitions of advisory warnings are not a satisfactory substitute for granting an unequivocal request for counsel." In this case, however, the evidence does not show that the defendant ever made a request for counsel or that counsel be present during the interrogation. He did not even testify that his telephone requests were for the purpose of calling counsel. Over 48 hours elapsed between the second time the *Miranda* rights were given and his second refusal and the third time his rights were read, at which time he agreed to make a statement.

Factfindings by the trial court on motion to suppress, etc., are accepted by us unless clearly wrong. In *State v. Teater*, *ante* p. 127, 131, 306 N.W.2d 596, 598-99 (1981), we held: "In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances. [Citations omitted.]"

Accepting the factfindings of the trial judge, the evidence then shows that after each of the occasions on July 14 when he declined to make a statement, the defendant's right to cut off questioning was scrupulously honored. In *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), the Supreme Court of the United States held that a second request after the passage of a significant period of time could be made and did not violate *Miranda* principles. The court there said at 104: "We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends

under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" In *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979), the Supreme Court of the United States, on an appeal from the Supreme Court of North Carolina where that state court held (interpreting *Miranda*) that where a defendant had once refused to make a statement there could be no subsequent waiver without counsel, held at 374-75: "The *per se* rule that the North Carolina Supreme Court has found in *Miranda* does not speak to these concerns. There is no doubt that this respondent was adequately and effectively apprised of his rights. The only question is whether he waived the exercise of one of those rights, the right to the presence of a lawyer. Neither the state court nor the respondent has offered any reason why there must be a negative answer to that question in the absence of an *express* waiver. This is not the first criminal case to question whether a defendant waived his constitutional rights. It is an issue with which courts must repeatedly deal. Even when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" The record indicates that the defendant has had considerable experience in the criminal courts.

Our own court has recently held: "The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time." *State v. Jackson*, 205 Neb. 806, 290 N.W.2d 458 (1980) (syllabus of the court). See, also, *State v. Moore*, 189 Neb. 354, 202 N.W.2d 740 (1972); *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979).

Since the preparation of this opinion but before its

adoption by the court, the opinion of the Supreme Court of the United States in *Edwards v. Arizona*, 49 U.S.L.W. 4496, was released on May 18, 1981. The court there held that the use of a petitioner's confession against him at his trial violated his right under the fifth and fourteenth amendments to have counsel present during custodial interrogation as declared in *Miranda* where, having exercised his right on January 19 to have counsel present during his interrogation, the petitioner did not validly waive that right on the following day.

We do not believe that the case governs this one for various reasons. In *Edwards* the proceeding had already reached the accusatory stage. The complaint had been filed. In the case before us the matter was still in the investigatory stage. In *Edwards* the defendant had specifically invoked his right to have counsel present; in the case before us defendant had not requested counsel at any of the times the *Miranda* cautions were given.

The facts in *Edwards* show that the accused had been given the *Miranda* warnings and agreed to make a statement. Later he changed his mind and said: "'I want an attorney before making a deal.'" Questioning ceased but he was not given an attorney. Later the *Miranda* warnings were given and he agreed to and did make a statement. The Supreme Court of the United States said (and these words contain the critical distinction): "Here, the critical facts as found by the Arizona Supreme Court are that Edwards asserted his right to counsel and his right to remain silent on January 19, but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions. Contrary to the holdings of the state courts, Edwards insists that having exercised his right on the 19th to have counsel present during interrogation, he did not validly waive that right on the 20th. For the following reasons, we agree.

"First, the Arizona Supreme Court applied an erroneous standard for determining waiver *where the accused has specifically invoked his right to counsel.*" (Emphasis supplied.) *Id.* at 4497.

The record is sufficient to clearly support the trial court's finding that there was an intelligent and voluntary waiver of the right to the presence of counsel at the time the statement was given, and we cannot say it was clearly erroneous. The evidence likewise supports the trial court's conclusion that the confession was intelligently and voluntarily given.

AFFIRMED.

IN RE INTEREST OF RONALD DUANE SHELBY AND MARTHA JOAN SHELBY, CHILDREN UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA, APPELLEE, V. WILMA SHELBY, APPELLANT.

306 N.W.2d 604

Filed June 5, 1981. No. 43694.

Parental Rights. Parental rights between a parent and child may be terminated when the parent has abandoned the child for 6 months or more immediately prior to the filing of the petition and such action is in the best interests of the child. Neb. Rev. Stat. § 43-209 (Reissue 1978).

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Affirmed.

Person, Dier, Person & Osborn for appellant.

Paul L. Douglas, Attorney General, and Stephen R. Illingworth for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

Wilma Darlene Shelby appeals from an order

terminating her parental rights to her children, Ronald, born July 18, 1975, and Martha, born September 30, 1973.

The children had been placed in foster care on August 31, 1977, because the mother had been arrested as a fugitive on an extradition warrant from Kansas. A petition was filed on September 15, 1977, alleging the children were "deprived of parental care for the reason that the mother [Wilma Shelby] is in custody in the State of Kansas on criminal charges and is apparently wanted in other jurisdictions and this lack of parental care is likely to continue for an indefinite period." An order of the county court entered that day placed custody in the court with supervision by the Phelps County Department of Public Welfare.

During the next 2½ years the children remained in foster care. There was no contact between the children and their mother during this time except an occasional telephone call and a few letters.

On October 25, 1979, a petition for termination of parental rights was filed, alleging abandonment for more than 6 months. Attempts to notify the mother by certified mail were unsuccessful, the notices being refused or returned as addressee unknown. On November 2, 1979, the mother called the clerk's office inquiring about the date of hearing and whether she could appear by counsel. Further attempts at personal service were unsuccessful, so service by publication was authorized on December 5, 1979.

On February 6, 1980, the date set for hearing, the mother did not appear, but telephoned the county judge and requested a continuance. The order of the county court recites that the mother admitted that she had known of the hearing for more than 30 days. The county court continued the hearing to February 15, 1980, and appointed counsel for the mother. A guardian ad litem for the children had been appointed sometime before December 5, 1979.

The mother appeared in person and by counsel at

the hearing on February 15, 1980. The county court found that the mother had abandoned the children for more than 6 months and terminated the parental rights of the mother. Upon appeal to the District Court the order was affirmed. The mother has now appealed to this court. The principal assignments of error relate to the sufficiency of the evidence to support the order terminating parental rights.

The record shows that appellant was absent from her children for a period of approximately 2½ years. Neither child's birth certificate lists a father and no one claiming to be the father visited the children during this period. At the time appellant was arrested by the Phelps County sheriff for extradition to Kansas, Ronald was 2 and Martha was 4 years old. The children were placed in the custody and care of a foster care family. Wilma Shelby served jail sentences in Kansas and Illinois on bad check charges. Following these brief sentences, she and a married male companion moved around the country. Appellant spent time in Kansas, Arkansas, Tennessee, Colorado, Alabama, and several towns in Illinois.

Appellant's contact with her children was infrequent and limited to a few phone calls and letters. From March 1978 through December 1978, appellant made no contact whatsoever with her children.

At the time the children were placed in foster care, they were ill-clothed and dirty. Ronald suffered from a severe case of diarrhea. Martha had repeated nightmares and showed signs of abuse administered by her mother and her male companion. Martha suffered great anxiety when she spoke with her mother during her infrequent phone conversations.

A psychologist testified that the children have grown intellectually, emotionally, and psychologically since being placed in foster care. The children recognize the foster parents as their psychological parents. The foster parents have expressed the desire to adopt the children.

In a similar case of abandonment this court stated: "It is, to say the least, unfair for the parent to leave the child in a legal limbo and regardless of length of time of separation to assert natural rights of the parent to custody. The paramount interests of the public and the court is the protection of the children, and where, as here, the finding of the juvenile court and District Court is not against the weight of the evidence or a clear abuse of discretion, their determination will be upheld. State v. Norwood, 194 Neb. 595, 234 N.W.2d 601; State v. Randall, 187 Neb. 64, 187 N.W.2d 586.

"We said in Goodman v. Goodman, 180 Neb. 83, 141 N.W.2d 445: 'Children are not chattels.' A bare assertion of parental natural right cannot prevail against the clear best interests of the children and the overwhelming evidence of disinterest and abandonment." *State v. Hernandez*, 199 Neb. 386, 389-90, 259 N.W.2d 272, 274 (1977).

The record contains clear and convincing evidence that Wilma Shelby abandoned her children within the meaning of Neb. Rev. Stat. § 43-209 (Reissue 1978) and that it was in the best interests of the children that her parental rights be terminated.

The appellant raises for the first time on appeal an issue concerning the county court's failure to appoint counsel for the mother at the September 15, 1977, detention hearing. Appellant argues that she was denied due process, since she was never advised by an attorney that she had a right of visitation following the children's placement in foster care.

Neb. Rev. Stat. § 43-205.06 (Reissue 1978) provides for the appointment of counsel in juvenile proceedings. "When any minor under eighteen years of age shall be brought without counsel before a juvenile court . . . [t]he judge shall inform such minor and his parent or guardian of their right to counsel at county expense if none of them is able to afford counsel. If the minor or his parent or guardian desires to have counsel appointed for such minor, or the parent or guardian

of such minor cannot be located, and the judge ascertains that none of such persons are able to afford an attorney, the judge shall forthwith appoint an attorney to represent such minor for all proceedings before the judge in the juvenile court . . . ." The court, under this section, is directed to appoint counsel for the minor in cases where the parent cannot be located only after it is determined that that party could not afford an attorney. The communication which came from appellant prior to the second hearing seemed to indicate that she had acquired an attorney. Nevertheless, when it was brought to the attention of the court, the court appointed an attorney for the mother. Appellant's attorney then requested and was granted a continuance. No further continuances were requested. Under the circumstances, the appellant was provided a full and fair hearing and was fully represented by competent appointed counsel.

The order which was entered at the detention hearing on September 15, 1977, was in the nature of a temporary order. It was necessary because of the emergency created by the arrest and extradition of the mother to Kansas. The mother has raised no question in this proceeding concerning the propriety or necessity of foster care at that time.

The mother's complaint that she was not advised of her right to visit the children has no merit. Her imprisonment in Kansas and Illinois was of rather short duration. After her release from imprisonment there was nothing to prevent her from taking steps to regain custody of the children. In fact, on March 31, 1978, she advised the foster mother that she would come to Holdrege, Nebraska, on April 15, 1978, to pick up the children. Nothing further was heard from the mother until December 11, 1978. The mother and her companion called again on March 19, 1979, and told the children "they'd be after them very soon."

The record demonstrates quite clearly that the mother had little interest in the children. She was

content to leave them in foster care while she traveled about the country. It was not until she learned of the termination proceedings that she exhibited any concern.

Nothing could be gained by a further hearing at this time on whether the children should have been placed in the custody of the court on September 15, 1977. The evidence which sustains the finding of abandonment, together with the evidence of abuse and neglect, would compel a similar finding at this time.

The record contains clear and convincing evidence that Wilma Darlene Shelby abandoned her children for more than 6 months within the meaning of § 43-209, and that it was in the best interests of the children that her parental rights be terminated.

The judgment of the District Court is affirmed.

AFFIRMED.

NANCY LEE KULLBOM, APPELLANT, V. TERRENCE L. KULLBOM, APPELLEE.

306 N.W.2d 844

Filed June 12, 1981. No. 43189.

1. **Divorce: Appeal and Error.** Dissolution of marriage actions are tried de novo on the record; however, this court, in reaching its decision, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite.
2. **Alimony: Property Division.** Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion.
3. **Property Division.** If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. The court shall include as part of the marital estate, for purposes of the division of property at the time

of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested. Neb. Rev. Stat. § 42-366(8) (Cum. Supp. 1980).

4. ——. The trial court retains broad discretion in valuing pension rights and in dividing such rights between the parties.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed as modified.

Warren S. Zweiback of Zweiback, Brady & Kasher, P.C., for appellant.

Steven J. Lustgarten of Lustgarten & Roberts for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and COADY, District Judge.

BRODKEY, J.

Nancy Lee Kullbom (Nancy), petitioner-appellant herein, has appealed to this court from a decree entered by the District Court of Douglas County, Nebraska, dissolving the marriage of the petitioner and Terrence L. Kullbom (Terrence), the respondent-appellee. In its decree entered on December 14, 1979, the trial court found that the marriage between the parties was irretrievably broken and dissolved the marital relationship. The court awarded custody of the minor children, Nick, Kelly Sue, and Matthew, to the petitioner, subject to reasonable rights of visitation by Terrence; ordered Terrence to pay child support in the sum of $250 per child per month until such time as the minor children attain majority, become emancipated, or die, or until further order of the court; and required Terrence to continue medical and health insurance in effect for the children and pay all uninsured medical and dental expenses. The court awarded the residence of the parties in Omaha, Nebraska, to Nancy and required her to assume and pay the mortgage on said property. The court also awarded to Nancy all the furniture and household items located in the residence; her jewelry; a 1978

Malibu station wagon, subject to a lien thereon; title to a life insurance policy; a coin collection; and a racehorse known as "Burnham" owned by the parties. The court further ordered Terrence to pay Nancy alimony in the amount of $1,500 per month for 121 months or until the death or remarriage of the petitioner. The court also required Terrence to maintain in full force certain life insurance policies in favor of the petitioner and minor children to the extent of the alimony and child support obligations.

In its decree, the court awarded to Terrence all his jewelry, personal effects, and household items located in his apartment; a 1979 Datsun, subject to a lien thereon; title to four life insurance policies; all rights, if any, to acquire certain football tickets to attend home football games of the University of Nebraska at Lincoln; and any rights to obtain certain season ticket seats to attend horseraces at Ak-Sar-Ben. In addition, Terrence was awarded all of the parties' interest in pension and profit-sharing plans maintained by Oral Maxillo-Facial Surgeons, Inc.; all common stock of said corporation owned by the parties; and all interest of the parties in certain investment partnerships known as Chanticleer Realty Associates, Ltd., and Blackstone, Ltd. Terrence was ordered to pay all the outstanding indebtedness incurred by the parties prior to December 1, 1979, and was relieved of all mortgage obligations upon the house and the payment of the lien upon Nancy's automobile. Finally, Terrence was ordered to pay attorney fees and costs to Nancy's attorney in the amount of $11,480, as well as those of his own attorney.

In her brief on appeal, Nancy makes the following assignments of error: (1) That the court erred in awarding her less than an equitable share in the property owned by the parties; (2) That the alimony awarded to her is inadequate in light of the circumstances of the parties; (3) That the child support award is inadequate in light of the circumstances of

the parties; and (4) That the court erred in not considering as a marital asset the husband's vested interest in pension and profit-sharing plans.

The factual background of this appeal, as revealed in the record, indicates that the parties were married in Gibbon, Nebraska, on September 7, 1963. At the time of their marriage, Terrence was a dental student, with no earnings and a negative net worth of between $5,000 and $10,000. Nancy had recently graduated from nursing school, and upon their marriage the parties moved to Iowa City, Iowa, where Terrence attended the dental school at the University of Iowa. Nancy became employed at the University Hospital and worked to support the parties. The couple's first child, Nick, was born on August 2, 1964. Terrence graduated from dental school in June of 1966, at which time he joined the armed services and was stationed in northern California until his discharge in 1968. During this period, the parties' second child, Kelly Sue, was born on October 23, 1968. Upon his discharge from the service, Terrence entered private practice in Sturgis, South Dakota, where he remained for 1 year. Thereafter he was accepted into an oral surgery residency program at the University of Nebraska at Omaha in 1970. After the parties moved to Omaha in May of 1970, Nancy returned to work as a nurse in local hospitals while her husband completed the residency program. Terrence completed his residency in May of 1973, at which time he became employed by his present employer, Oral Maxillo-Facial Surgeons. Nancy then quit working as a nurse, and the parties' third child, Matthew, was born on December 27, 1973.

It is well established that dissolution of marriage cases are tried de novo on the record; however, this court, in reaching its decision, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. *Witcig v. Witcig*, 206 Neb. 307, 292 N.W.2d 788 (1980); *Boroff v. Boroff*,

204 Neb. 217, 281 N.W.2d 760 (1979). Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. *Olson v. Olson*, 195 Neb. 8, 236 N.W.2d 618 (1975). See, also, *Burton v. Burton*, 205 Neb. 865, 290 N.W.2d 658 (1980); *Ragains v. Ragains*, 204 Neb. 50, 281 N.W.2d 516 (1979); *Sullivan v. Sullivan*, 192 Neb. 841, 224 N.W.2d 542 (1975). In determining what percentage of the marital estate each person is to receive, the court must consider all pertinent facts in reaching an award that is just and equitable. *Chrisp v. Chrisp*, 207 Neb. 348, 299 N.W.2d 162 (1980); *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980). The court, in dividing the property, must take into consideration the circumstances of the parties, the duration of the marriage, the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Neb. Rev. Stat. § 42-365 (Reissue 1978). See, also, *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980); *Ragains v. Ragains, supra.*

Nancy first assigns as error the action of the District Court in dividing the marital estate of the parties. The record discloses that both Nancy and Terrence have individually and jointly contributed property and other valuable services to the marriage. The parties were both 39 years of age at the time of trial and had accumulated a net worth of approximately $260,000 during their marriage. The property acquired by the parties during their 16 years of marriage comprises the bulk of the parties' marital

estate. In view of the fact that both parties contributed substantially to the acquisition of the marital estate, we believe each party is entitled to one-half of the value or equity of the property in that estate. *Chrisp v. Chrisp*, 207 Neb. 348, 299 N.W.2d 162 (1980). A review of the record convinces us that a fair and equitable division of the marital estate has not been made. At trial, it was established that Terrence has an annual income in excess of $100,000. His income includes an annual car allowance of $6,000, a salary of approximately $75,000, and an annual contribution from his employer to his pension and profit-sharing plans of $18,500. In addition, the respondent earns approximately $5,500 in stipends as a part-time instructor at Creighton University and the University of Nebraska Medical Center. The petitioner, on the other hand, has not been employed outside the home since 1973. At the time of trial, according to the evidence and by stipulation of the parties, Terrence's interest in the pension and profit-sharing plans totaled $75,133.25, which the trial court awarded him in its decree. In addition, he was awarded the parties' interest in Oral Maxillo-Facial Surgeons, Inc., the value of which was in dispute and contested, and ranged from a minimum of $48,000 to a maximum of $116,000, depending on whether outstanding accounts receivable were included in computing the book value of the corporation. He was also awarded the parties' partnership interests in Chanticleer Realty Associates, Ltd., and Blackstone, Ltd., which were valued at $54,400 and $15,000, respectively.

Nancy, however, was awarded the parties' residence in Omaha, which was valued at $97,650, but which is subject to a mortgage of $69,747. This results in a net award to the petitioner of $27,903 of equity in the house.

Nancy contends that the trial court erred by not considering the respondent's pension and profit-sharing plans as part of the marital estate, subject

to division by the court. This contention necessitates an examination of the law of this state with reference to pensions and pension plans as marital property. As late as May 28, 1980, this court followed the rule that a pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement, but may be considered as a source for the payment of alimony. *Witcig v. Witcig, supra.* See, also, *Andersen v. Andersen,* 204 Neb. 796, 285 N.W.2d 692 (1979); *Howard v. Howard,* 196 Neb. 351, 242 N.W.2d 884 (1976). However, in 1980 the Nebraska Legislature added subsection (8) to Neb. Rev. Stat. § 42-366 (Reissue 1978), which became effective July 19, 1980; and § 42-366(8) (Cum. Supp. 1980) now provides: "If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. *The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested.*" (Emphasis supplied.) It now appears, therefore, that by virtue of the action of the Legislature, the law of this state now requires that pension plans and retirement plans shall be included as part of the marital estate for the purposes of the division of property at the time of dissolution. In *Witcig v. Witcig,* 206 Neb. 307, 292 N.W.2d 788 (1980), we pointed out the problems inherent in the determination of the value of pension interests and the contingent nature of such interests, and as a result thereof in that case decided to follow our previous rule as announced in *Howard v. Howard, supra.* Other courts which have followed the new rule announced by the Nebraska Legislature have experienced problems in determining the valuation of pension rights for the purpose of the

division of marital property in dissolution actions. In *Bloomer v. Bloomer*, 84 Wis. 2d 124, 129-35, 267 N.W.2d 235, 238-41 (1978), the Supreme Court of Wisconsin stated: "Although it is settled that pension rights must be considered, trial courts are presented with a complex task in properly valuing the rights in those plans. . . .

"The problem of valuing prospective benefits under a pension plan is frequently exacerbated by the fact that unmatured rights may be terminated by death, discharge, or other contingencies. [Citations omitted.] Valuation is further complicated by the dual nature of most pension plans. If the employee continues to work until retirement, the payments to the employee, to the extent derived from employer's contributions, are in the nature of deferred compensation. If, however, the employee terminates work before retirement age, the usual plan provides at least for the return of employee contributions. . . . A variety of methods of valuation have been approved in the individual cases, without any analysis of the proper theory for valuing the asset. . . .

. . . .

"None of what we have said detracts from the fact that the trial court retains broad discretion in valuing pension rights and in dividing them between the parties. . . .

. . . .

". . . There are at least three ways in which the value can be determined. Whether any one of these methods is an appropriate exercise of discretion depends upon the circumstances of the case, the status of the parties, and whether the result is a reasonable valuation of the marital asset." The court in *Bloomer* proceeded to discuss the three methods referred to, the first being that the court could consider the amount of the employee's contributions to the fund plus interest and award the wife an appropriate share. Second, the trial court could attempt to calculate the present value of the

employee's retirement benefits when they vest under the plan, stating that under either of the first two methods the trial court would have the discretion to order the payment to the wife of her share in either a lump sum or in installments, depending primarily on the other assets and relative financial positions of the parties. The third method referred to by the court, which it states has been used widely in other states and is referred to as an alternative in *Pinkowski v. Pinkowski*, 67 Wis. 2d 176, 226 N.W.2d 518 (1975), is to determine a fixed percentage for the wife of any future payments the husband receives under the plan, payable to her as, if, and when paid to the husband. With reference to this third plan, the court in *Bloomer* states at 136, 267 N.W.2d at 241: "Under this approach, of course, it is unnecessary to determine the value of the pension fund at all. The court need do no more than determine the appropriate percentage to which the non-employee spouse is entitled."

In *Pinkowski, supra* at 184, 226 N.W.2d at 522, the court stated: "In view of the fact that there are sufficient assets for the court to make a distribution to the wife out of the proceeds of the house after including the value of the pension fund, we reverse that portion of the judgment. The court may then exercise its discretion in determining what the division of the assets between the parties should be. The court may, on the other hand, impose a trust on the pension fund and require the husband to pay any part received into court. The court may determine either a percentage or a specific amount that the wife should receive of such fund and provide for payment to her of her share in lump sum or in instalments depending upon how the funds are eventually received by the husband. Thus the court may withhold distribution of a pension fund asset between the parties until the money is actually received when he retires."

In the instant case, however, we have no problem with the valuation of the pension and profit-sharing

trusts, as the parties have stipulated their value to be $75,133.25. The appellee contends, however, that the court "obviously" took the value of the pension and profit-sharing trusts into account when considering the amount of the alimony award. While it is, of course, possible that the court did consider the value of the trusts, it is not at all clear from the record that it did so, particularly in view of the fact that, although the court divided and allocated the property between the parties in its decree, it did not place any specific values upon the items awarded to each party. We conclude that an equitable division of the marital property requires that Nancy be awarded 50 percent of the stipulated value of the trusts in question, in the amount of $37,566.75. However, since it is obvious that the appellee will not receive the value of such trusts until some unspecified time in the future, we conclude that he should not be required to pay Nancy the additional sum represented by her share of the trusts until he receives it, particularly in view of the fact that she has been awarded other specific property from the marital assets. This is not to say, however, that the respondent may not, if he chooses, pay Nancy the sum referred to in a lump sum, or by installments, prior to the time that he receives the benefits from the two trusts, for whatever reason.

Another matter which must be considered in connection with the property division between the parties is the action of the trial court in awarding Nancy the racehorse, Burnham, which the evidence in the record establishes has a value of $6,000. It is Nancy's contention that this racehorse should have been awarded to Terrence and that she should be awarded the value of the animal. The evidence in the record shows that Terrence bought the horse for the purpose of training it to become a racehorse. The witness, O. J. Glass, farm manager and horse trainer at the Glass & O'Day Stables, testified that the cost of maintaining the horse could be as high

as $500 per month if it is placed into training. Because of the expense involved in training the horse, and the substantial expense in feeding it, we conclude that in this case Nancy is fully justified in looking this gift horse in the mouth and objecting to that part of the award by the trial court. We therefore conclude that Terrence should be awarded the horse, Burnham; and, in lieu thereof, Nancy should be awarded the value of the horse in the amount of $6,000.

Appellant also contends that the award of the trial court with reference to the amount of child support and alimony is too low. Our review of the record convinces us that the trial court did not abuse its discretion in the amount awarded for these purposes and that we should not disturb such award on appeal to this court.

Appellant has also requested an award of an attorney fee for the services of her attorney in this court. We note that the trial court awarded an attorney fee for services in that court in the amount of $11,480, of which amount $10,000 represented an attorney fee and $1,480 costs and expenses. The trial court was apparently convinced of the value of her attorney's services after a hearing to set the amount of the fee. At that hearing appellant's attorney introduced into evidence a very itemized and detailed statement of the amount of the time devoted by him and by his associate in this dissolution action, as well as the hourly rates customarily charged for the services of each of them. The amount of the fee awarded by the trial court is not an issue in the appeal to this court. A review of the record convinces us that much of the work required in an appeal to this court was already performed in connection with the trial in the District Court. We are of the opinion that the appellant should receive an additional amount of $2,000 for the services of her attorney in appealing the case to this court.

Except as modified above, the decree entered by the trial court should be, and hereby is, affirmed.

AFFIRMED AS MODIFIED.

COADY, District Judge, dissents.

McCOWN, J., concurring.

Some cautionary comments may be appropriate in this case. Here the value of the pension was stipulated and the methods of valuation discussed in the opinion are those which have been approved by various courts. Rights under pension contracts vary greatly and in most cases the court has no power to alter the terms of the contract or provide for its payment in any fashion other than that required by the contract. The terms of the pension contract also affect the valuation of the pension itself.

The majority opinion does not require any specific methods of valuation to be used by the District Court nor restrict its broad discretion in valuing pension rights. Neither does the majority opinion imply that pensions themselves must be divided in kind between the parties but only that the value of any pension or retirement plan shall be included as a part of the marital estate.

CLINTON, J., joins in this concurrence.

LEROY SPRUNK AND IRENE SPRUNK, APPELLEES, V. HENRY DITTER AND MABEL DITTER, APPELLANTS.

306 N.W.2d 850

Filed June 12, 1981. No. 43436.

1. **Injunction: Contempt.** The disobedience of an injunction must be willful before a breach of it may be punished as a contempt.
2. **Contempt.** If there is a question as to what a court intends by its order, a party who acts on his own interpretation does so at his peril.
3. **Damages: Contempt.** An award of damages is improper in a contempt proceeding.

Appeal from the District Court for Platte County: ROBERT R. MORAN, Judge. Affirmed as modified.

Thomas R. Burke and Lyman L. Larsen of Kennedy, Holland, DeLacy & Svoboda and Wilbur L. Johnson of Johnson & Skorupa for appellant.

Edward Asche for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN and NORTON, District Judges.

BOSLAUGH, J.

The defendants, Henry Ditter and Mabel Ditter, appeal from an order of the District Court entered on April 1, 1980, finding them in contempt for willfully failing to comply with the order of the District Court entered on January 29, 1979. The order directed the defendants to restore elevations on their land to those existing prior to 1963; to pay a fine of $500 and the costs of the proceeding; and to pay all costs and damages sustained by the plaintiffs because of the defendants' failure to comply with the previous order of the court. The defendant Henry Ditter was also sentenced to 15 days' imprisonment, but execution of the sentence was suspended upon condition that the defendants comply with the order.

The litigation arises out of a controversy concerning drainage across farmland in Platte County, Nebraska. The plaintiffs, Leroy Sprunk and Irene Sprunk, own the northeast quarter of the northeast quarter of Section 10, Township 17 North, Range 3 West of the 6th P.M. in Platte County, Nebraska. The defendants own the west half of the northwest quarter of Section 11, which lies directly east of the plaintiffs' land. Mildred Ditter and Darlene Whitlow own the west half of the northeast quarter and the east half of the northwest quarter of Section 10.

A natural depression or drainway runs through the land of Mildred Ditter and Darlene Whitlow, across the plaintiffs' land, and then across the defendants' land. Water drains across the plaintiffs' land, through two culverts under a road lying between the plaintiffs' and the defendants' land, and then across the defendants'

land where it empties into a ditch on the Union Pacific Railroad right-of-way.

In 1963 the defendants leveled their land and erected a dike along the west boundary of their land. The result was to obstruct the drainage of water from the plaintiffs' land. This action was commenced on August 26, 1964, to compel the defendants to remove the dike and restore their land to the elevations existing prior to 1963.

On April 18, 1975, the trial court found that the defendants had obstructed the natural flow of water in the drainway across their land, and ordered the defendants to remove the dike and artificial fills on their land which obstructed or impeded the natural flow of water and to restore their lands to the natural levels which existed prior to 1963. The plaintiffs were awarded damages in the amount of $2,632.13, and the defendants were enjoined from interfering with the flow of water in the natural drainway upon their land as it would flow in the natural course of drainage.

On May 7, 1976, the defendants were ordered to show cause why they should not be punished for contempt for failure to comply with the order of April 18, 1975. On June 18, 1977, the trial court found the defendants had failed to comply with the order of April 18, 1975, and they were given until December 15, 1977, to comply with the order. On January 29, 1979, this order was modified and the defendants were given until May 1, 1979, to comply with the order of the court. A further extension to July 1, 1979, was granted on June 5, 1979.

On September 19, 1979, the plaintiffs again filed a motion alleging the defendants had failed to comply with the order of January 29, 1979. The trial on this motion resulted in the order of April 1, 1980, from which this appeal was taken. No appeal was taken from any of the previous orders of the trial court. All orders previous to the order of April 1, 1980, became final, are res judicata, and are binding upon the defendants.

The defendants contend the order of April 1, 1980,

was erroneous because the defendants had substantially complied with the order of January 29, 1979; the "language of duty" in the order of January 29, 1979, was improperly expanded; the proceeding was barred by the rules of res judicata or double jeopardy; and there can be no recovery of damages in a contempt proceeding.

Since there was no appeal from the order of January 29, 1979, the issue now is limited to whether the record shows the defendants willfully failed to comply with that order. The disobedience of an injunction must be willful before a breach of it may be punished as a contempt. *Kasparek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963).

Much of the defendants' argument centers around the finding in the order of January 29, 1979, that "the plaintiffs have failed to prove beyond a reasonable doubt that the defendants have not removed the dike so as to restore their land at that point to the level existing prior to 1963." The defendants contend that evidence as to elevations in the dike area along the west boundary should not have been received or considered because the January 29, 1979, order was res judicata and determined that the dike area had been restored to pre-1963 levels. The problem with the defendants' argument is apparent when the language of the order is considered together with the previous orders.

The order of January 29, 1979, was a *partial* modification of the order of June 18, 1977, which found that the defendants had failed to completely remove the dike as required by the previous orders. The June 18, 1977, order found that "the elevations which should have been attained on the west side of the defendants' property" were those shown in column 1, letters A through H on exhibit 16B. The order further provided that to the extent the dike extends north or south from the designated elevations in column 1, "the dike should have been removed to elevations corresponding to the level of defendants' land immediately to the east of the dike."

The order of January 29, 1979, also referred to the order of April 18, 1975, which required that the dike construction be removed *and the lands be restored to conditions existing previous to the land-leveling operations and the construction of the dike.* The 1979 order found specifically that the defendants had "wilfully failed to restore the elevations on their lands to those existing prior to 1963. Those elevations and their locations on the defendants' lands are set forth on Exhibit 1, attached hereto and incorporated by reference."

Although the 1979 order found that the plaintiffs had failed to prove that the dike had not been removed, the trial court found that the evidence did show that the defendants had willfully failed to restore the elevations on their lands to those existing prior to 1963.

The elevations shown on exhibit 1, which was attached to and made a part of the order of January 29, 1979, were derived from the survey of the defendants' property made in 1962, before the leveling work took place. The 1962 survey determined elevations at stations 60 feet apart. The first row of stations east of the west boundary were located 60 feet east of the centerline of the road lying between the plaintiffs' land and the defendants' land. Since the road was 66 feet wide, the distance between the west fence line and the first row of stations east of the fence line was 27 feet. The principal controversy between the parties relates to the land between the fence line and the first row of stations east of the fence line.

After the order of January 29, 1979, the defendants did considerable work on their land but did nothing to reduce the elevations on the 27 feet lying west of the first row of stations. The result was that this land remained at the elevation resulting from the leveling work and was an artificial obstruction to water draining from the lands to the west and flowing through the culverts under the road west of the defendants' land.

This is illustrated by the elevations shown on exhibit 1 at the first four stations directly east of the 30-inch cul-

vert. The 1962 survey shows these elevations to be 47.5 feet. The evidence shows that after the land had been leveled, these elevations going from west to east were, respectively, 48.1, 47.6, 47.9, and 47.7 feet. In other words, for water to drain across the defendants' land as it had prior to 1963, the land at these stations had to be restored to an elevation of 47.5 feet and that elevation be maintained *between the fence line* and the first station. This was what the June 18, 1977, order required in reference to elevations to be attained "on the west side" of the defendants' property.

From our examination of the record we conclude that the defendants have not complied with the order of January 29, 1979, in that they have not restored their land to the elevations existing prior to 1963, particularly in the 27 feet directly east of the west fence line and in the area east of the culverts.

The order of April 1, 1980, is affirmed in all respects except as hereinafter modified. The defendants shall have an additional 90 days after the date on which the mandate of this court is filed in the District Court in which to comply with the order of April 1, 1980.

If the defendants were in doubt as to what was required to comply with the order of January 29, 1979, their proper remedy was to obtain the further advice and instructions of the trial court. As we stated in *Kasparek v. May*, 174 Neb. 732, 740, 119 N.W.2d 512, 518 (1963): "When there is a question as to what a court intends by its order, and one acts on his own interpretation, he does so at his peril."

However, in this case, because of the possibility of confusion resulting from the finding in the order of January 29, 1979, that the plaintiffs had not proved that the dike had not been removed so as to restore the land at that point to the level existing prior to 1963, we conclude that it would be inequitable to enforce that part of the order of April 1, 1980, which required the defendants to pay a fine of $500 and the defendant Henry Ditter to be imprisoned in the county jail for 15 days.

Accordingly, that part of the order is vacated.

Since an award of damages is improper in a contempt proceeding, that part of the order of April 1, 1980, relating to damages after January 29, 1979, is vacated. See *Kasparek v. May, supra.*

The order of April 1, 1980, as modified, is affirmed. All costs are taxed to the defendants.

AFFIRMED AS MODIFIED.

REAGAN, District Judge, concurring.

I concur with the majority opinion except for the conclusion that it would be inequitable to enforce the sanctions imposed upon the defendants.

Imposition of sanctions by a trial court after a contempt adjudication is an exercise of discretion that is reviewable only for an abuse of discretion. 17 C.J.S. *Contempt* § 124(5) (1963). In the case of *Smolczyk v. Gaston,* 147 Neb. 681, 686, 24 N.W.2d 862, 865-66 (1946), this court stated: "The trial court had the parties before him and had a better opportunity to judge the degree of willfulness and contumaciousness of the contempt than does this court. An examination of the record reveals ample evidence to sustain the action of the trial court. Unless an abuse of discretion is evident, offenses against the authority and dignity of a court must be left largely to the judgment of the court against which the offense was directed. Unless such a rule be followed, trial courts will be greatly handicapped in protecting the authority and dignity of the courts and in maintaining a public attitude of general obedience to law as announced by judicial pronouncement."

No abuse of discretion exists in this case. I would modify the trial court's order only to the extent the jail sentence of the defendant Henry Ditter would be suspended if he complied with the April 1, 1980, order within 90 days from the mandate of this court.

STATE OF NEBRASKA, APPELLEE, V. ELIZABETH VICTORIA FARR, APPELLANT.

306 N.W.2d 854

Filed June 12, 1981. No. 43667.

1. **Statutes: Legislative Intent.** A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.
2. ____: ____. The legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances.
3. **Statutes.** It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results.
4. ____. A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served.
5. **Evidence: Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

P. M. Conley for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Elizabeth Victoria Farr (Farr), was convicted of violating Neb. Rev. Stat. § 28-912 (Reissue 1979) by unlawfully removing herself from official detention following conviction for the commission of an offense, and was ordered by the trial court to be incarcerated in an institution under the jurisdiction of the Department of Correctional Services for a period of 1 year. It is from this judgment and order Farr now ap-

peals to this court. We affirm.

On December 27, 1978, Farr was sentenced to 1 year's probation for a misdemeanor offense of destruction of property. On May 8, 1979, an affidavit to revoke her probation was filed. On May 25, 1979, Farr pled nolo contendere to the motion to revoke her probation and she was sentenced to a term of 6 months in the county jail. She began to serve her sentence on June 3, 1979.

The record further discloses that Farr and a member of the Lincoln Police Department (detective) knew each other and that from time to time Farr had given police officers, including this detective, information regarding various criminal matters. Shortly after July 1, 1979, and while Farr was serving her 6-month sentence in the city jail, the detective saw her in the hallway of the jail and asked her if she had any idea about a series of robberies that had been going on at several Safeway stores in Lincoln and at several Arby's restaurants in Lincoln during the month of June 1979 involving a white female suspect. Farr told the detective she might possibly be able to help and he told her he would talk to her about it later.

A few days later the detective returned to the jail where he visited with Farr about the robberies. Farr was shown a composite drawing of the suspect in the robbery cases. She thought the drawing was familiar but could not, at that time, remember the individual's name.

When the detective and Farr met again in the hallway of the jail several days later, she told him she thought she had a piece of paper at her mother's house that had the name of the suspect in the robbery written upon it. The detective arranged to take Farr to her mother's house to look for the paper with the name written upon it. She was then taken by the detective to her mother's home where they looked for the paper. After a short time, Farr reported to the detective that she was unable to locate the piece of paper but thought she knew some people who lived at an apartment house in Lincoln who might be able to help her. When they arrived at the

apartment they apparently found that the people that the appellant was looking for had moved, and Farr was returned to the jail.

The detective next spoke to Farr a few days later when she called regarding the physical condition of her boyfriend who had been arrested. She advised the detective that if she were able to speak to her boyfriend she was certain that she could find out the name of the individual involved in the armed robberies. As a result of that offer, a meeting was arranged between herself and her boyfriend, and Farr was brought to police headquarters where she met with her boyfriend. Further conversation followed concerning the possible robbers of the Safeway stores and Arby's restaurants, but Farr was still unable to provide the detective with the name and she was returned to jail.

On July 10, 1979, Farr again contacted the detective and advised him that she had been unable to get in contact with her boyfriend who, she said, knew the name of the robber, but claimed that if they went to her mother's home again she could look for her boyfriend along the way or that he might be at her mother's house. She also advised the detective that she could look again for the piece of paper that had the robbery suspect's name written on it. She further advised the detective that her mother, who was watching her children while she was in jail, was ill and she would like to check on the welfare of her children who were staying with her mother. The detective testified that Farr actually begged him to take her so that she could check on the welfare of her children and that she guaranteed that if she was allowed to do that she would provide the name of the robbery suspect.

As a result of that offer, the detective checked Farr out of jail and took her to her mother's house in a police cruiser. Farr and the detective both entered the mother's house. When Farr went into a bedroom the detective stepped outside of the living room onto the front porch and lit a cigarette. He waited on the porch for about 1 or 1½ minutes. When he did not hear or see

anyone inside the house, he went into the house and called Farr by name. He then walked through the house and could not find her. Farr's mother appeared and told him that Farr had taken off running. The detective attempted to locate Farr in the area but was unsuccessful. She was apprehended and returned to jail some 36 or 37 days later.

Farr's principal argument is that when the police detective removed her from jail and took her to her mother's home it was solely for personal reasons and not official reasons. She therefore maintains that while she was with the detective she was not in legal custody and therefore could not violate § 28-912(1). We believe that the argument is neither persuasive nor correct.

The pertinent portions of the statute involved in this action provide as follows: "(1) A person commits escape if he unlawfully removes himself from official detention . . . . Official detention shall mean . . . detention in . . . any facility for custody of persons under . . . conviction of crime . . . or any other detention for law enforcement purposes . . . .

. . . .

"(3) Irregularity in bringing about or maintaining detention . . . shall not be a defense to prosecution under this section if the escape is from . . . detention pursuant to commitment by official proceedings."

In examining the statute, we must keep certain rules of construction in mind. To begin with: "A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent." *State v. Nance*, 197 Neb. 257, 260, 248 N.W.2d 339, 341 (1976). " 'The legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances . . . . ' " *Tom & Jerry, Inc. v. Nebraska Liquor Control Commission*, 183 Neb. 410, 419, 160 N.W.2d 232, 239 (1968). "It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to

absurd, unjust, or unconscionable results." *State v. Saltzman*, 194 Neb. 525, 531, 233 N.W.2d 914, 918 (1975). Furthermore: "A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served." *State v. Nance*, *supra* at 260, 248 N.W.2d at 341.

In the recent case of *City of Lincoln v. Nebraska Liquor Control Comm.*, 208 Neb. 630, 634, 304 N.W.2d 922, 925 (1981), we said: "A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute." See, also, *O'Neill Production Credit Assn. v. Schnoor*, 208 Neb. 105, 302 N.W.2d 376 (1981).

We believe that when we apply the rules noted above to the statute in question and the facts of this case, we can reach no other conclusion but that Farr did indeed commit an escape in violation of § 28-912.

The evidence unquestionably supports the view that at the time Farr fled from her home she was then being detained in a facility for custody of persons under conviction, pursuant to commitment by official proceedings; and the fact that she was then temporarily in the custody of a member of the Lincoln Police Department, authorized to remove individuals from the confines of the jail complex for official purposes, does not change the situation. Clearly, Farr knew that she was not free to go or to accept any offers which would preclude her returning to the jail complex as soon as the purpose of her going to her mother's home was concluded.

Farr vigorously argues that the purpose of removing her from the jail complex and taking her to her mother's home was not for official business, but rather for the

personal benefit of Farr. In this regard there is indeed some conflict in the evidence. Farr maintains that her trip to her mother's home was purely for personal reasons and without any intent to obtain for the police detective the name of a burglary suspect. The police detective, on the other hand, vigorously denies that to be the case, and maintains that he would not have taken her to her mother's home at her request but for her assurance that if he did so she would deliver to him the name of the burglar at some point in time, if not right then. He testified on direct examination as follows:

"Q Was the purpose of your transporting the defendant to the premises at 2030 P Street in Lincoln, Lancaster County, Nebraska, on July 10th, 1979, to pursue the investigation of the armed robberies you have earlier described?

. . . .

"A Yes.

"Q And that, at least, was your purpose, is that correct?

"A Yes, sir.

"Q Did you have any other purpose in going to that address?

"A Yes, sir.

"Q What was the other purpose?

"A Miss Farr has been a source of information for me for quite a few number of years, and I have done numerous things in order to keep her supplying this source of information, and I was afraid that if I didn't take her there on that particular day, even though I didn't feel that she was going to come up with the name that she had promised, that she would become angry or get mad and would refuse to supply information to me in the future regarding these cases that were currently under investigation, or future cases that would be under investigation."

The evidence of the detective, if believed, would clearly establish that his purpose in taking Farr out of the jail complex and to her mother's home, from whence she fled, was because of police motives and not because

of personal motives. Farr disputes that fact, but that conflict was resolved by the trial court and is not for us to reexamine. "It is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." *State v. Woodruff*, 205 Neb. 638, 640-41, 288 N.W.2d 754, 757 (1980). See, also, *State v. Carter*, 205 Neb. 407, 288 N.W.2d 35 (1980); *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979). Under the facts in this case it is clear that at the time Farr fled she was both still being detained in custody pursuant to commitment by official proceedings as a person convicted of a crime and in custody of the police detective for law enforcement purposes. The trial court was correct in its finding, and its judgment and sentence must be affirmed.

AFFIRMED.

JOHN R. HANLON, COMMISSIONER OF LABOR, APPELLEE, V. JOHN C. BODEN, APPELLEE, AND OMAHA SYMPHONY ASSOCIATION, APPELLANT.

306 N.W.2d 858

Filed June 12, 1981. No. 43676.

1. **Employment Security Law.** Under the Nebraska Employment Security Law a week of unemployment with respect to any individual shall mean any week during which he performs less than full-time work and the wages payable to him with respect to such week are less than his weekly benefit amount.
2. ____. The disqualification of employees of educational institutions and professional athletes for unemployment benefits under Neb. Rev. Stat. § 48-628(h) and (i) (Reissue 1978) does not include professional symphony musicians.
3. ____. The beneficent provisions of an unemployment compensation act should receive a liberal construction in favor of those claiming benefits under it.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

James L. Quinlan of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellant.

Pamela A. Mattson for appellee Hanlon. Thomas J. Jenkins of Gast and Kielty for appellee Boden.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The claimant filed a claim for unemployment benefits which was allowed by the Deputy Commissioner of Labor. The employer appealed. The decision was reversed by an appeal tribunal. The Commissioner of Labor appealed to the District Court. The District Court reversed the decision of the appeal tribunal and reinstated the award of the Deputy Commissioner of Labor and the employer has appealed to this court.

The claimant, John C. Boden, is a professional musician who completed his third season as a principal horn player with the Omaha Symphony on May 15, 1979. During the 1978-79 season Boden had been working under the terms of a master agreement negotiated between his employer, Omaha Symphony Association, and his union, the Omaha Musicians' Association, and under an individual musician's contract between the Omaha Symphony, Inc., and Boden. Under Boden's contract he agreed to play 180 "services" during the period of time between September 1978 and May 15, 1979. A salary of $7,800 was payable in 16 equal installments on the 15th and final day of each month during the "season." Payment for additional "services" or for solo performances, or other items affected by the master agreement, were payable in addition on the pay dates following the performance. A "service" is a concert or rehearsal as defined in the master agreement.

Prior to May 1, 1979, Boden and the symphony entered into a new contract for the period from September 10,

1979, through May 18, 1980, the conditions of which were the same as the 1978-79 contract except that the total salary was $8,000.

On May 15, 1979, Boden's contract for the 1978-79 symphony season was completed and he collected his last paycheck on that date. Boden had two private recording sessions as an independent contractor immediately after May 15th. Finding no further work, he filed his claim for unemployment benefits on or about May 20, 1979. He also contacted Opera/Omaha and listed himself at the Musicians' hiring hall and made other attempts to obtain employment. From June 11, 1979, through July 15, 1979, Boden was employed in connection with a music festival in Peru, Nebraska, and that period of time is not involved here.

On June 11, 1979, the Deputy Commissioner of Labor determined that Boden was separated from his employment with the Omaha Symphony Association on May 15, 1979, when the contract of employment was fulfilled by both parties, and that the fulfillment placed the claimant in an unemployed status as defined by Neb. Rev. Stat. § 48-602(18) (Reissue 1978) and he was therefore entitled to claim benefits.

The symphony association appealed the deputy's determination to the Nebraska Appeal Tribunal. The appeal tribunal found that the contract of employment covered a period of months, ending May 15, 1979, and that salary payments were made only during the contract period. The tribunal determined that compensation was, in fact, an annual salary and that the contract of employment was for an annual sum and that compensation paid during the contract period was payable with respect to the entire year and not with respect to the actual days of service or actual months for concert season performances. The tribunal therefore determined that Boden had no weeks of unemployment during the 52-week period from the beginning of performance of services under the contract and was therefore ineligible for any unemployment insurance benefits.

The Commissioner of Labor filed a petition for review in the District Court. After hearing, the District Court specifically found that Boden was unemployed as required by Neb. Rev. Stat. § 48-627 (Reissue 1978) in that his contract of employment with the Omaha Symphony Association expired at the conclusion of the last scheduled service for the Omaha Symphony Association. The District Court determined that the contract between the claimant and the Omaha Symphony Association was a seasonal contract and not an annual contract as evidenced by the fact that the symphony association did not control the employee in any manner after the season was completed. The District Court therefore reversed the findings and decision of the appeal tribunal and reinstated the determination of the Deputy Commissioner of Labor and awarded the claimant all benefits that he was entitled to under the Employment Security Law. The Omaha Symphony Association has appealed.

The position of the symphony association on appeal is that the salary payable for the symphony season was actually an annual salary payable with respect to each week of the year and that it should be treated as if it were a salary for teaching or a salary for a professional athlete.

Section 48-602 contains the basic definitions of the Employment Security Law, and subsection (18) of that section provides: "Week of unemployment with respect to any individual shall mean any week during which he performs less than full-time work and the wages payable to him with respect to such week are less than his weekly benefit amount."

Under the contracts involved in this case the contract period extended from a specific date in September of one year to a specific date in May of the next year. The master agreement refers to the "season" and requires that payment for the number of guaranteed services will be made in 16 equal installments, relative to the individual musician's guarantee, on the 15th and final day of each month during the "recognized season." Neither

the master agreement nor the individual musician's contract places any obligations upon any party as to employment or services or the payment of wages or salary during the "off season." The master agreement, however, does require written notice from either party to renew or terminate an individual musician's contract "for the coming season" at a time prior to the end of the current contract period. Under the contracts here no wages were payable to Boden "with respect to" any week in the off season, unless his salary can be said to be on an annual basis but payable over a shorter period of time. The symphony association contends that Boden was actually employed on an annual salary basis and should be considered to be in the same class as teachers or professional athletes. The major problem with that argument is that teachers and professional athletes are specifically disqualified for benefits by statute.

Neb. Rev. Stat. § 48-628 (Reissue 1978) provides that an individual shall be disqualified for benefits for any week of unemployment under various specified circumstances. Subsection (h) disqualifies a teacher from benefits for any week of unemployment between two successive academic years, if there is a contract or a reasonable assurance that the teacher will perform services for any educational institution in the next academic year.

Subsection (i) disqualifies a professional athlete for any week of unemployment between two successive sports seasons if such individual performed such services in the first of such seasons and there is a reasonable assurance that such individual will perform such services in the later of such seasons. It should be noted also that subsection (g) disqualifies an individual for any week of unemployment if such individual is a student.

While there may be similarities between teachers, professional athletes, and professional symphony musicians, there can be no doubt that the language of § 48-628(h) and (i) is clearly and precisely limited to employees of educational institutions and professional athletes. The

Legislature may be free to extend the disqualifications to other classes of employees but this court cannot do so without rewriting the statute.

The symphony association urges this court to construe § 48-628 liberally in order to deny unemployment benefits to Boden. It is generally held that the beneficent provisions of an unemployment compensation act should receive a liberal construction in favor of those claiming benefits under it. See 81 C.J.S. *Social Security* § 159 (1977). This court has also held that the Employment Security Law is to be liberally construed in order to accomplish its beneficent purposes. See, *Hunter v. Miller*, 148 Neb. 402, 27 N.W.2d 638 (1947); *Parson v. Chizek*, 201 Neb. 754, 272 N.W.2d 48 (1978). These beneficent purposes are not served by a strained construction of the statutes which will deny an unemployed worker the benefits of the act.

The judgment of the District Court was correct and is affirmed.

AFFIRMED

STATE OF NEBRASKA, APPELLEE, V. JOHN L. AUSTIN, APPELLANT.

306 N.W.2d 861

Filed June 12, 1981. Nos. 43705, 43706.

1. **Municipal Corporations: Municipal Ordinances.** A city of the primary class is granted power by the Legislature to make all ordinances not inconsistent with the general laws of the state as may be necessary to promote the public health, safety, and welfare. The authority to enforce such ordinances is granted to such city in the area which is within the city or within 3 miles of the city and outside of any organized city or village. Neb. Rev. Stat. § 15-236 (Reissue 1977).
2. **Constitutional Law: Municipal Ordinances: Statutes.** Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. Courts will not pass upon a question of constitutionality unless it becomes necessary to do so.
3. **Evidence: Judgments.** Where there is a total lack of evidence to establish that defendant dumped or deposited refuse upon his property

on the dates alleged in the complaints, in violation of Lincoln Municipal Code § 8.28.020, defendant's convictions and sentences must be vacated and set aside.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed in part, and in part reversed.

Dennis R. Keefe, Lancaster County Public Defender, Don C. Bauermeister, and Jerry Soucie for appellant.

John C. McQuinn, Assistant City Prosecutor, for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

John L. Austin, the defendant and appellant herein, appeals to this court from an order of the District Court of Lancaster County affirming his convictions in the municipal court of Lincoln, Lancaster County, Nebraska, finding him guilty of the violation of two separate ordinances of that city, and imposing fines upon the defendant for such violations. In the first complaint filed against him it was alleged in count I thereof that on or about June 18, 1979, he "did dump or deposit refuse at property legally described as the northeast quarter of south half of Lot 17 of the southeast quarter, Township 9 North, Range 6 East to [sic] the Sixth P.M. of Stockwell Subdivision, Lancaster County, Nebraska, in violation of Lincoln Municipal Code section 8.28.020." In count II of that complaint, it was alleged that on or about June 18, 1979, he failed to keep the above-described property "free from rubbish, trash, junk and or other offensive and unwholesome matter and did permit conditions liable to produce diseases which are conducive to the breeding and existence of rats, mice, flies, mosquitoes, bacteria, and other rodents and insects, all of which conditions constitute a public nuisance," contrary to

§ 8.44.040 of the Lincoln Municipal Code. The second complaint filed against the defendant also contained two counts charging violations of the same sections of the Lincoln Municipal Code as in the first complaint, but alleged that such violations occurred on or about June 22, 1979. The two complaints were consolidated for trial before the Lincoln Municipal Court on October 17, 1979, which court found the defendant guilty as charged under both complaints and fined him the sum of $100 on each count. The defendant then appealed the convictions and sentences to the District Court of Lancaster County, Nebraska, which court sustained the motion of the State to affirm the judgments and sentences imposed by the municipal court, and found that there was a factual basis for so doing and that the sentence imposed in each count was proper and not an abuse of discretion by the trial court. A subsequent motion for a new trial was overruled by the District Court, and the defendant has now appealed to this court. We affirm in part and reverse in part.

The record in this case reveals that the property in question, which was acquired by the defendant in 1955, is approximately 3½ acres in size and is located outside the corporate boundaries of the city of Lincoln, but is within 3 miles of the Lincoln city limits.

At trial it was established that in January of 1979 Austin was notified by the Lincoln-Lancaster County Health Department that certain conditions existing upon his property were causing a health hazard. Bruce Baugh, an environmental sanitarian for the health department, testified that he first visited the property "right after" January 1, 1979, and twice a week thereafter, but there had been no substantial change in the condition of the property. At trial, Baugh described the premises as follows: "There were numerous abandoned autos. There was a large pile of scattered lumber lying on the ground, scattered thereabouts. There was a pool of standing water,

which is for — which would — conducive to mosquito breeding. There was farm equipment, obsolete farm equipment. There was various pieces of commercial equipment. There was various, various pieces of household appliances or household fixtures, such as discarded parts of toilet stools, weeds." When asked whether the condition of the property was conducive as a breeding place for rodents, Baugh responded: "Yes, it would. And the condition of the property is very conducive to the existence and breeding of rodents, mosquitoes, and it was a health hazard. It is a — also could be classified as a public nuisance. The property has been in that — has been in that condition for some time and is very much a — conducive to the existence of rodents. There is ample food supply for rodents and this [sic] conditions on the property offer very good harborage. Excellent harborage."

Also called as a witness at trial was Robert T. Wheeler, code administrator in the inspections division of the city of Lincoln. Wheeler testified that he notified the defendant on several different occasions to clean up the property. He stated that the defendant had informed him that the property would be cleaned up in 6 months, but no action was taken by June 18, 1979. Wheeler also testified to the fact that the defendant's property was not designated a dumping ground by the city of Lincoln. The final witness to testify at trial was the defendant, who appeared pro se in the action before the municipal court. He admitted on cross-examination that he had placed various vehicles and machinery on his property, but gave no testimony as to the date or dates he had done so.

At the conclusion of the trial, Judge Donald R. Grant advised the defendant that the State had sustained its burden of proving that he was in violation of the city ordinances. However, he deferred sentencing the defendant for 3 weeks so that the defendant could clean up the property. Judge Grant stated: "All I'm doing is telling you that if you get this cleaned up,

get this — you can have this stuff all hauled out there to a — away from there and clean this property up, that I will consider that in assessing penalties. If you do not, I will also consider that fact in assessing penalties. And I'm willing to continue this for a three-week period to see if you want to spend your money one way or another way, or as the gentlemen indicated, you may even make some money on it." After 3 weeks, however, the defendant still had failed to clean up the property, and he was subsequently fined $100 on each of the four counts set out in the complaints.

As previously indicated, the defendant appealed the judgments of the municipal court to the District Court, which affirmed the trial court. We note, however, that although the defendant had represented himself in the trial in the municipal court, he was appointed counsel who represented him in the hearing before the District Court.

Defendant's principal contentions in his appeal to this court are: (1) That a primary city does not have the specific power to impose a fine or imprisonment on an individual for depositing or failing to remove old machinery from his property which is outside the corporate limits of the city, but within its 3-mile jurisdictional border, and therefore the courts did not have jurisdiction to convict him under the ordinances of the city of Lincoln, above referred to; and (2) That there was a failure of proof on the part of the State with reference to his convictions for depositing rubbish on his property, as alleged in count I of both complaints.

Appellant challenges the validity of § 8.28.020 of the Lincoln municipal ordinances. That section, which deals with the designation by the city council of "dumping grounds," reads as follows: "The city council, shall, by resolution, designate a place or places, public or private, for the dumping and disposal of garbage, scavenger matter, rubbish, refuse, rubble from demolished buildings or structures, filth, slops, manure,

ashes, offal, human excrement and other offensive or obnoxious substances. It shall also provide a place or places for the burying or disposal of dead animals. It shall be unlawful for any person to dump, deposit or otherwise dispose of any garbage, scavenger matter, rubbish, refuse, rubble from demolished buildings or structures, filth, slops, manure, ashes, offal, human excrement and other offensive or obnoxious substances or bury or dispose of any dead animals within the corporate limits of the city *or within three miles of the limits thereof,* upon any ground, premises or place other than that designated by the city council as herein provided." (Emphasis supplied.)

We note that the power of a Nebraska municipal corporation to make and enforce such ordinances must be authorized by state statute. In the instant case, the city of Lincoln is a city of the primary class and is governed by Chapter 15 of the Nebraska Revised Statutes, two sections of which are directly applicable to the resolution of this appeal. Neb. Rev. Stat. § 15-236 (Reissue 1977) provides for the control of disease by a primary city as follows: "A primary city may make all such ordinances, by-laws, rules and regulations not inconsistent with the general laws of the state as may be necessary or expedient to promote the public health, safety and welfare, including ordinances, by-laws, rules and regulations as may be necessary or expedient to prevent the introduction or spread of contagious, infectious or malignant diseases. *This power and authority is granted to such city in the area which is within the city or within three miles of the city and outside of any organized city or village.* It may create a department of health, make laws and regulations for that purpose, *and enforce all ordinances, by-laws, rules and regulations made as authorized herein as provided in section 15-263.*" (Emphasis supplied.)

Neb. Rev. Stat. § 15-263 (Reissue 1977) defines the enforcement authority granted cities of the primary

class and the penalties which may be imposed on any person found to be in violation of the city ordinances. Section 15-263 provides in pertinent part: "A primary city may make all such ordinances, by-laws, rules, and regulations not inconsistent with the general laws of the state as may be necessary or expedient, in addition to the special powers otherwise granted by law . . . for promoting the public health, safety, convenience, comfort, morals, and general interests and welfare of the inhabitants of the city, and to enforce all ordinances by providing for imprisonment of those convicted of violations thereof at hard labor for a period not to exceed six months *and to impose forfeitures, fines, and penalties not exceeding five hundred dollars for any one offense*, recoverable with costs, and, in the default of the payment thereof, to provide for confinement in the city prison or county jail . . . ." (Emphasis supplied.)

It was pursuant to the specific authority granted by the aforementioned statutes that the city of Lincoln adopted § 8.28.020 of the Lincoln Municipal Code, which has previously been set out in full above and need not be repeated here. We note, however, that the term "refuse," as referred to in § 8.28.020, is defined in § 8.28.010(d) and also in § 8.44.060(c) of the Lincoln Municipal Code to include discarded automobile bodies, automobiles, parts of automobiles, machinery, parts of machinery, and any other waste matter or material not herein designated as garbage which accumulates in the conduct of a household, business establishment, shop or factory of any kind or nature. It is clear that the articles of materials found on defendant's property were "refuse" within the meaning of that term as used in the foregoing sections of the city ordinances.

The defendant was also convicted of violating § 8.44.040 of the Lincoln Municipal Code. Subsection (a) of that ordinance provides as follows: "It shall be the duty of every owner, lessee, tenant or occupant

of any lot or parcel of ground within the city *or within three miles of the corporate limits thereof* to keep said premises owned, leased, or occupied by him free from garbage, refuse, rubbish, brush, trash, junk, old building material, offal, manure, and any other offensive or unwholesome matter, and it shall be unlawful for such owner, lessee, tenant, or occupant of such lot or parcel of ground to permit, keep or maintain thereon any such condition liable to become putrid or injurious to the public health, or any such condition liable to produce disease, or which is conducive to the breeding and existence of rats, mice, flies, mosquitoes, bacteria, or any other rodents or insects. *The maintenance or permitting of any of the foregoing conditions on any such lot or parcel of ground is hereby declared to be a public nuisance and shall constitute a misdemeanor punishable as hereinafter provided in this code.*" (Emphasis supplied.)

It is the general and well-established rule that ordinances and statutes are presumed to be constitutional, and that their unconstitutionality must be clearly established; and further that courts will not pass upon a question of constitutionality unless it becomes necessary to do so. *Aschenbrenner v. Nebraska P.P. Dist.*, 206 Neb. 157, 291 N.W.2d 720 (1980); *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979); *Metropolitan Utilities Dist. v. City of Omaha*, 171 Neb. 609, 107 N.W.2d 397 (1961); *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956). Construed in this context, we are convinced that the ordinances under which the appellant was charged were adopted under a specific grant of authority from the Legislature as embodied in the aforementioned statutes. *Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976); *Jacobs v. City of Omaha*, 181 Neb. 101, 147 N.W.2d 160 (1966); *Christensen v. City of Fremont*, 45 Neb. 160, 63 N.W. 364 (1895). It is clear that the City of Lincoln was

given specific powers to control and regulate the disposition of refuse within the city and within a 3-mile area outside the corporate limits in order to promote the public health and prevent the spread of disease. In addition, § 15-263 clearly provides the city with authority to enforce said ordinances through the imposition of fines and other specified penalties.

The evidence, as revealed in the record and adduced as testimony at trial, clearly establishes that the appellant is the owner of land which is located within the 3-mile jurisdictional boundary outside the corporate limits of the city of Lincoln, which land was not a designated dumping ground for the city. The evidence also establishes that there exists on the property certain articles of refuse and other conditions which are favorable to the breeding of rodents, mosquitoes, and bacteria; that the conditions described on said property create a health hazard to the community; and that the appellant was given ample time to correct conditions after he received notice from the Lincoln-Lancaster County Health Department. It was only after appellant's repeated failure to clean up his property that he was penalized by the trial court.

The record indicates that the ordinances promulgated by the city of Lincoln are reasonably related to the control and prevention of disease. We conclude that the provisions of §§ 8.28.020 and 8.44.040 are clearly applicable and enforceable within the 3-mile zone outside the city's corporate limits under the power granted to the city by § 15-236.

We now address the question of the sufficiency of evidence presented at the trial to sustain the conviction of the defendant on the charges contained in the four counts in the complaints filed against him. We have no trouble in finding that the evidence was sufficient to sustain his conviction on the counts of failing to remove the refuse under § 8.44.040, as it is clear

that the "refuse" was discovered on the property on both June 18, 1979, and June 22, 1979, on which dates the property was actually inspected by the city official. However, we have more difficulty with reference to the charges contained in the complaints in which it is alleged that on both of the aforesaid dates the defendant dumped or deposited refuse on the property. A careful review of the record in this case convinces us that there is no evidence whatsoever in the record to sustain the allegation that even "on or about" the dates mentioned the defendant dumped or deposited such refuse on the property. It is true that the record reflects admissions on the part of the defendant that after his return from the Army and his purchase of the property in question, he had brought automobiles and other various articles onto the property, and perhaps had even moved their location from time to time on the property; but nowhere did he admit, nor was any evidence adduced, with reference to the date or dates this was done; nor does the evidence in any way establish that the "dumping or depositing" was done on or about June 18, 1979, or on or about June 22, 1979, as alleged in the complaints. That being so, we are convinced that the State has not established by sufficient evidence what it has alleged in count I of its complaints; and, therefore, the convictions of the defendant for violating § 8.28.020, and the sentences imposed by the court thereafter for such violations, must be vacated and set aside. Defendant's convictions and sentences with references to count II of the complaints, involving § 8.44.040, are sustained.

AFFIRMED IN PART, AND IN PART REVERSED.

CLINTON, J., participating on briefs.

CURTIS HELGENBERGER, APPELLANT, V. CAROLYN HELGENBERGER, APPELLEE.

306 N.W.2d 867

Filed June 12, 1981. No. 43761.

1. **Child Custody: Child Support: Judgments.** A decree awarding custody of a minor child and fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the child.
2. **Child Custody: Sexual Misconduct.** Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative. The nature of the act or acts, the circumstances surrounding the commission thereof, and the probable effects as are related to the future welfare of the children must be carefully considered.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Thomas R. Wolff for appellant.

William G. Line of Kerrigan, Line & Martin for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Curtis Helgenberger (Mr. Helgenberger), appeals from an order entered by the District Court for Dodge County, Nebraska, denying Mr. Helgenberger's application to modify a decree of the District Court for Dodge County, Nebraska, entered on the 26th day of March 1980 with respect to the custody of his minor child, Brad Helgenberger (Brad). We affirm.

The record discloses that Mr. Helgenberger and the appellee, Carolyn Helgenberger (Mrs. Helgenberger), were married on March 13, 1976. At the time of the marriage Mrs. Helgenberger had a daughter by a previous marriage. Custody of the daughter is not involved in this matter. Of the marriage, one

child, Brad, was born to the parties on January 24, 1977. On March 26, 1980, a decree of dissolution was entered by the District Court for Dodge County, Nebraska, dissolving the marriage of the parties.

It appears that both parties were represented by counsel at the time the dissolution was granted and, as part of the matter, the parties entered into a property settlement agreement which recited in part: "2. Child Custody. That both parties are fit and proper persons to be awarded the care, custody and control of the minor child, namely Brad, born January 24, 1977, but, subject to further order of the Court, the custody of said minor child shall remain joint between both Husband and Wife, with possession to be as follows: a. Wife shall have possession of said child at all times not specified herein . . . . b. Husband shall have possession of said child as the parties agree upon, including, but not limited to, (1) Every Friday beginning in the A.M. to every Sunday in the A.M. (2) Every other holiday, commencing with Easter, 1980. (3) Every Fathers Day. (4) Every Christmas either on the six days prior to Christmas Eve, including Christmas Eve, or on Christmas Day and the six days following Christmas Day. (5) Every month of August, commencing with 1980, during which time the Wife shall have possession from Friday P.M. to Sunday P.M. during said month. As set forth herein, the parties may agree to such other times of possession as is in the best interest of said child." The property settlement agreement was approved by the District Court and incorporated into a decree entered by the District Court on March 26, 1980.

On August 21, 1980, Mr. Helgenberger filed an application for modification of the decree, requesting that full custody of Brad be placed with him and that reasonable visitation rights be granted to Mrs. Helgenberger. The basis for the application for modification provided as follows: "Petitioner further alleges that in accordance with the decree and property settlement entered heretofore on March 26, 1980, both parties,

Petitioner and Respondent, were granted joint custody of said child, with visitation rights specifically set out therein. Petitioner now alleges that it is in the best interest of the child to modify the decree to provide custody only in the Petitioner, with possession in the Petitioner, and reasonable visitation rights to the Respondent."

After hearing on the application, the trial court, on September 10, 1980, entered its order in which the trial court specifically found that said order should be denied, "because of failure to demonstrate a change of circumstances since the entry of decree herein . . . ."

Mr. Helgenberger presents this case to this court as though this appeal is a direct appeal from the decree entered by the District Court on March 26, 1980, in which custody of Brad was granted to Mrs. Helgenberger. We believe, in that respect, Mr. Helgenberger is in error. It must be kept in mind that this is not a direct appeal wherein we are examining the trial court's finding as to the best interests of the child, but, rather, a proceeding wherein a decree was entered by the court pursuant to a property settlement agreement voluntarily entered into by the parties and from which no appeal was taken. The real question presented to the trial court initially, and to us on appeal, is whether the decree concerning child custody should be modified.

We have frequently noted that a decree awarding custody of a minor child and fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the child. See, *Youngberg v. Youngberg*, 193 Neb. 394, 227 N.W.2d 396 (1975); *Gray v. Gray*, 192 Neb. 392, 220 N.W.2d 542 (1974). In the case of *Bokelman v. Bokelman*, 202 Neb. 17, 22, 272 N.W.2d 916, 919 (1979), we said: "A decree fixing custody of minor children will not be modified unless there has been

a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. The determination of the trial court with respect to changing the custody of minor children will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence." See, also, *Carper v. Rokus*, 194 Neb. 113, 230 N.W.2d 468 (1975); *Ritchey v. Ritchey*, 208 Neb. 100, 302 N.W.2d 372 (1981). The basis for that rule appears to be articulated in part in our decision in *Miller v. Miller*, 196 Neb. 146, 148, 241 N.W.2d 666, 668 (1976), wherein we said: "Minor children are entitled to stable home conditions. They are not chattels and their custody should not be the subject of a continuous contest between divorced parents at the expense of their well-being."

Our examination of the record convinces us that the trial court was correct in its finding that there was no material change in circumstances or that the best interests of the minor child required such modification. The evidence was clear that Brad was being well cared for by Mrs. Helgenberger. The principal basis for Mr. Helgenberger's claim that there has been a material change in circumstances justifying a change of custody for the best interests of the child is evidence that Mrs. Helgenberger has permitted a male acquaintance to remain at the family home overnight on several occasions. On these occasions the children were also in the home. While it appears from the record that on some of these occasions Mrs. Helgenberger and her male acquaintance may have engaged in sexual relations, the evidence is clear that the children were asleep and totally unaware of what was transpiring.

Likewise, the evidence indicates that on one occasion Mrs. Helgenberger and the children spent the night in the home of her male acquaintance. The record discloses that the parties did not on that

occasion engage in sexual relations and the children were totally unaware that Mrs. Helgenberger was anywhere except asleep with them in the living room, though it appears she did occupy the bed of her acquaintance during some part of the night.

While the action of Mrs. Helgenberger in permitting her male acquaintance to spend the night on occasion in her home or her spending one night with the children in his home may not be laudatory, nor an indication that she has on all occasions used the best of discretion, the evidence falls substantially short of establishing that she is not fit to have custody of Brad or that his best interests demand any change.

In the recent case of *Batenhorst v. Batenhorst*, 205 Neb. 601, 604, 288 N.W.2d 740, 742 (1980), we said: "Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative. [Citations omitted.] The nature of the act or acts, the circumstances surrounding the commission thereof, and the probable effects as are related to the future welfare of the children must be carefully considered." Also, see cases cited in *Ritchey v. Ritchey*, *supra*.

Our examination of the entire record leads us to the same conclusion reached by the trial court to the effect that this conduct by Mrs. Helgenberger was not a material change in circumstances affecting the well-being of the minor child and did not justify the modifying of the decree. For that reason the judgment of the trial court is affirmed.

AFFIRMED.

McCOWN, J., concurs in result.

HERMAN WIEDEMAN, APPELLEE, V. JAMES E. SIMON CO., INC., APPELLANT.

307 N.W.2d 105

Filed June 19, 1981. No. 43293.

1. **Adverse Possession.** To claim by adverse possession, the claimant must show by a preponderance of the evidence actual, open, exclusive, and continuous possession under a claim of ownership for 10 years.
2. ____ To gain title by adverse possession against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another.
3. ____ Sufficiency of possession depends upon the character of the land and the use that can reasonably be made of it.
4. ____ When a fence is constructed as a boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the claimant gains title to such land by adverse possession.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Winner, Nichols, Meister & Douglas for appellant.

Wright & Simmons for appellee.

Heard before BOSLAUGH and WHITE, JJ., and RONIN, BARTU, and KELLY, District Judges.

BARTU, District Judge.

Defendant-appellant, James E. Simon Co., Inc., appeals the decision quieting title of a 2.57-acre tract in the plaintiff-appellee, Herman Wiedeman, by adverse possession and from an award for damages.

The 2.57-acre tract in question is a strip of land approximately 100 feet by 1,150 feet lying south of the legal line between the north and south halves of the north half of Section 27, Township 22 North, Range 54 West of the 6th P.M. in Scotts Bluff County, Nebraska. Plaintiff is the record title owner since 1965 by deed from David Wiedeman, his father, of the north half of the north half of that section, and defendant is the record title owner since 1977 by deed from

John C. Herstead and Helen A. Herstead of land adjoining that of the plaintiff on the south, described as that part of the south half of the north half of Section 27 north of the Winter's Creek canal right-of-way.

At least as far back as 1944 there has been a fence in the general vicinity of the boundary line between the two properties, running east and west. From the west line of the section the fence runs approximately straight east about 1,150 feet, then jogs north about 100 feet to near the line between the north half of the north half and the south half of the north half of Section 27. It is this area between the actual boundary and the fence to the south which is in dispute.

The land comprising the strip and the land either side of it to the north and south consist of a sandy-gravel soil covered with cactus, junk, and variable grass. It has been used as a dump ground, and the trash that has been dumped there was never completely cleaned up. The fence along the south side of the disputed area was connected with the fence along the road on the west side of defendant's property. There has never been a fence along the road on the west end of the disputed area or along the west side of plaintiff's land.

When Wiedeman moved to the property in 1944 as tenant for his father, part of the disputed area had been used as a dump. He put up a sign prohibiting dumping and cleaned up some of the trash. The second year he was on the land he pastured the land in the disputed area. He has pastured the area about every third year since then, up until about 3 years prior to trial, in conjunction with pasturing the roughage from a rotation of beets and corn on the farmland to the north.

In pasturing this land, the plaintiff would put up an electric fence on the west and north and completely fence in the disputed land with the rest of his land. When this land was pastured there was a high of 200 to

250 cattle on the land for 6 weeks to 2 months. Limited vegetation in the disputed area would not justify a permanent fence on the west and pasturing it each year. The plaintiff also rented land, including the disputed area, a couple of times to persons who pastured sheep thereon. At one time he hauled gravel out of the disputed area for use in his yard. Throughout the years, the plaintiff maintained the fence which bordered the disputed area on the south.

At no time did defendant's predecessors in title, the Hersteads and L. M. Bryan, claim ownership to any land north of the fence. There was a period of time for approximately 10 years prior to the Hersteads' ownership that the plaintiff leased the land south of the fence under an oral lease with L. M. Bryan. There was no evidence that the plaintiff did or intended to lease land north of the fence. The plaintiff claimed ownership of the disputed land and used the land up to the fence continuously since 1944. In the past there had been negotiations undertaken by the plaintiff to sell land, of which the disputed area was a part, to people who wanted to build homes thereon. At one time the plaintiff offered to sell an acre for $4,000 and turned down an offer of $3,500. Another time the plaintiff was offered $50,000 by a contractor for 8 acres of farmland and gravel area.

Lew Herstead, son of the defendant's predecessor in title, testified that he did not have any knowledge of the plaintiff maintaining the fence and did not ever see any cattle pastured in the disputed area. However, Herstead was never out on the land when this would have been going on. He did not believe the fence to be on the exact survey mark and did not know "where the land was lost from or gained." Herstead also testified that he had the impression that Wiedeman thought the fence was not quite on the line, but that "he lost as much as we had, that it was a give and take proposition between the two lines."

After the defendant purchased its property in 1977,

it began making preparations for gravel excavation on the disputed area. About this time, Cecil Simon, superintendent for the defendant, approached the plaintiff to let him know what they would be doing. Simon testified that he knew the plaintiff had been using that land up until that time. The defendant had a survey made, tore down the fence, drilled a well, and began to excavate gravel on the disputed area.

This matter is triable in this court de novo. However, in determining an appeal in an equity action involving questions of fact, this court will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

This court has many times set forth the standard for the burden of proof of adverse possession as a preponderance of the evidence to show that the claimant had been in actual, open, exclusive, and continuous possession under a claim of ownership for 10 years. *Pettis v. Lozier*, 205 Neb. 802, 290 N.W.2d 215 (1980); *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978); *Cunningham v. Stice*, 181 Neb. 299, 147 N.W.2d 921 (1967); *Mentzer v. Dolen*, 178 Neb. 42, 131 N.W.2d 671 (1964); *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957).

Defendant argues that the burden of proof in an adverse possession case is by clear and convincing evidence and that the plaintiff failed to meet that burden. To the extent that *Foos v. Reuter*, 180 Neb. 301, 142 N.W.2d 552 (1966), and *Wells v. Tietge*, 143 Neb. 230, 9 N.W.2d 180 (1943), establish a clear and convincing standard, they are overruled.

To gain title by adverse possession against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. *Shirk v. Schmunk*, 192 Neb. 25, 218 N.W.2d 433 (1974); *Whaley v. Mingus*,

188 Neb. 351, 196 N.W.2d 516 (1972); *Mentzer v. Dolen, supra; Fitch v. Slama*, 177 Neb. 96, 128 N.W.2d 377 (1964).

The sufficiency of the possession in an action of this kind depends upon the character of the land and the use that can reasonably be made of it. The possession is sufficient if the land is used continuously for the purpose to which it is adapted. *Cunningham v. Stice, supra; James v. McNair*, 164 Neb. 1, 81 N.W.2d 813 (1957); *Oliver v. Thomas*, 173 Neb. 36, 112 N.W.2d 525 (1961); *Walker v. Bell*, 154 Neb. 221, 47 N.W.2d 504 (1951).

Where a fence is constructed as the boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the parties gain title to such land by adverse possession. *Conkey v. Anderson Farms, Inc.*, 205 Neb. 708, 289 N.W.2d 541 (1980); *Vetick v. Kula*, 197 Neb. 209, 247 N.W.2d 637 (1976); *Hendrickson v. Glaser*, 204 Neb. 492, 283 N.W.2d 41 (1979); *Shirk v. Schmunk, supra; Abood v. Johnson*, 189 Neb. 87, 200 N.W.2d 20 (1972); *McCain v. Cook*, 184 Neb. 147, 165 N.W.2d 734 (1969).

The nature and character of the disputed tract was near to wasteland insofar as agricultural purposes were concerned. Its terrain was gently rolling with a sandy-gravel soil which rendered it useless for crop production. Prior to plaintiff's possession in 1944, it was used as a dumping ground for junk. Subsequent to his possession it was used continuously for the grazing of livestock as growth of vegetation and rotation of other crops on grounds north of the disputed tract would permit. The only natural vegetation it supported was cactus, sagebrush, and isolated bunches of grass.

Subsequent to plaintiff's possession he posted the disputed tract, closing it to dumping. He continuously maintained the perimeter fence on the south side of the tract. These acts, coupled with the use of the land

continuously for the purpose to which it was adapted, were all open, notorious acts of dominion which gave notice to defendant's predecessors in title of plaintiff's claim to the disputed tract.

The evidence conclusively establishes that the plaintiff and defendant's predecessors in title considered the south fence on the disputed strip as the boundary line between their respective properties from 1944 to the time that the defendant purchased the land with notice of plaintiff's claim to the same.

Plaintiff has shown, by a preponderance of the evidence, actual, open, exclusive, and continuous possession of the disputed tract under a claim of ownership for more than 10 years. The District Court's decision quieting title to the disputed tract in the plaintiff should be and is hereby affirmed.

Defendant concedes that the trial court's assessment of damages for the removal of gravel was correct if the plaintiff had title to the disputed tract. Defendant does argue, however, that the plaintiff failed to show, by a preponderance of the evidence, ownership of the fence destroyed by the defendant. This contention is without merit inasmuch as plaintiff did assert claim to the real estate and all appurtenances thereto by his maintenance and use of the fence as his own. Evidence establishes $700 as the fair and reasonable replacement cost of the fence destroyed. Plaintiff's award of damages from the defendant in the sum of $1,808.84 for the removal of gravel and in the sum of $700 for the destruction of a fence, in a total sum of $2,508.84, should be and is hereby affirmed.

AFFIRMED.

IN RE INTEREST OF HIATT.
STATE OF NEBRASKA, APPELLEE, V. CHRISTINE HIATT, APPELLANT.

307 N.W.2d 108

Filed June 19, 1981. No. 43327.

1. **Parental Rights.** An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209(6) (Reissue 1978) must be supported by clear and convincing evidence.
2. ——— The juvenile court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children and it appears by the evidence that one or more of the conditions set out in Neb. Rev. Stat. § 43-209 (Reissue 1978) exist.
3. **Child Custody.** While there may be no direct affirmative evidence of child abuse, where there is ample evidence of neglect and a lack of proper parental care directly and adversely injurious to the health, safety, and well-being of the child, the best interests of the child become paramount.
4. **Parental Rights.** Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Maureen Fitzgerald Brown of Brown Law Offices for appellant.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky for appellee State.

Donald B. Fiedler, guardian ad litem.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is a proceeding for termination of parental rights. The separate juvenile court of Douglas County terminated the parental rights of the mother and father of two children. The mother has appealed.

In June 1975 the appellant and John Hiatt, Jr., were married in Utah. The appellant was 14 years old and pregnant, and her husband was 15 years old.

On January 10, 1976, their first son was born and the second boy was born on April 10, 1977. Financial and other problems were present from the beginning of the marriage. The father was employed only occasionally and the mother was receiving ADC allotments. On several occasions the mother obtained food and supplies for the children from her grandmother and her father. In July 1977 the mother requested a caseworker for Child Protective Services to place the boys in temporary foster care for 2 weeks until the mother could "get things together." The boys were returned to the mother after 16 or 17 days when she requested it. The marital situation of the parents and the home life provided for the boys deteriorated from July 1977 through January 1978. The caseworker for Child Protective Services made numerous home visits and talked to the mother frequently, both in person and by telephone. During this period of time the home was described as very dirty, with unwashed dishes, diapers, and trash all around. On numerous occasions there was either no food or a grossly inadequate supply of food for the children in the home. The sole financial support for the family was the ADC check and the father took part of that for his personal use.

On January 27, 1978, the parents delivered the two boys to the caseworker and told her they could no longer care for the children. The parents had previously been advised of the consequences of delivering custody and of possible court intervention.

A detention hearing was held on February 16, 1978. By the time of the hearing the parents had apparently changed their minds and sought to regain custody of the boys. Both parents testified, however, that it would be difficult to provide for the children at that time and that it would be better for the children to remain in the custody of the State for the time being. At the close of the hearing the court ordered the children to remain in the custody of the State and continued the

case for 6 to 8 weeks.

On May 18, 1978, an adjudication hearing was held. The parents, their counsel, and the guardian ad litem for the children all appeared. The parents admitted the allegations of the petition that the two children were homeless or destitute or without proper support within the meaning of Neb. Rev. Stat. § 43-202(1) (Reissue 1978). The separate juvenile court found that the children were within the meaning of § 43-202(1) on proof beyond a reasonable doubt and ordered the custody of the children to remain with the State until further order of the court. At the time of the hearing the parents were living in South Dakota, were having marital difficulties, and the mother was pregnant again.

The mother filed a divorce petition in June 1978, but the parties were reconciled and a third child was born on October 29, 1978. A further disposition hearing was held in the present case on December 18, 1978. The court ordered the father to obtain employment and provide a stable source of income for the family, and both parents were ordered to obtain adequate housing and furniture, to cooperate with court officers and to visit the children regularly, and the children were continued in the custody of the State. The mother reactivated her divorce petition and a decree was entered on July 5, 1979. The mother was given custody of the third child and the custody of the two children under the jurisdiction of the juvenile court in this proceeding was reserved pending further order of the juvenile court.

A motion for termination of the parental rights of the mother and father was filed on August 21, 1979. Hearing was set for September 27, 1979, but stay was granted because of the active military service of the mother. She joined the U.S. Army Reserves and reported for duty at Fort Leonard Wood, Missouri, on July 6, 1979, and was thereafter assigned to Fort Jackson, South Carolina, for additional training.

She returned to Nebraska on October 9, 1979. After further continuance, a hearing was held on the motion for termination of parental rights on December 19, 1979. At the outset of the hearing the father admitted the allegations of the motion for termination of parental rights and his rights are no longer involved.

A supervisory service officer of the juvenile court who had been working with the parents since February 1978 testified that the mother's situation had not improved since 1978, and that, in her opinion, if the mother were given custody of the children she would not care for them. She testified that the mother had visited her children only twice in the previous 6 months and that when the mother left for military service she left no forwarding address and the juvenile court and Child Protective Services did not know her whereabouts. She also testified that the children had been in foster care for 2 years and that the younger boy did not even know his mother. She also testified that the mother was admitted to the Nebraska Psychiatric Institute in the spring of 1979 and, upon release, stayed at the Women's Shelter for a few days and joined the Army approximately 6 weeks later.

Caseworkers for Child Protective Services and Douglas County Social Services also testified, generally confirming the testimony of the juvenile court service officer and particularly that the mother visited with the children on only a few of the many authorized occasions and sometimes scheduled a visit and failed to appear. In the opinion of the caseworkers the best interests of the children required the termination of parental rights. The guardian ad litem for the children joined the State in requesting the termination of parental rights.

The mother testified in her own behalf and testified that she felt she could support the three children on her ADC benefits plus her Army pay and a government grant which she received while she was attending a technical college. Essentially, her testimony was

that she believed she could take care of her children, but that if her children were returned to her and things did not work out she could always relinquish her parental rights then.

At the conclusion of the hearing the separate juvenile court terminated the parental rights of the mother and the father under Neb. Rev. Stat. § 43-209(6) (Reissue 1978). The mother has appealed.

An order of the juvenile court terminating parental rights under § 43-209 must be supported by clear and convincing evidence. *In re Interest of Goodon*, 208 Neb. 256, 303 N.W.2d 278 (1981).

The juvenile court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children and it appears by the evidence that one or more of the conditions set out in § 43-209 exist. *In re Interest of Goodon, supra.*

While there may be no direct affirmative evidence of child abuse, where there is ample evidence of neglect and a lack of proper parental care directly and adversely injurious to the health, safety, and well-being of the child, the best interests of the child become paramount. *In re Interest of Kimsey*, 208 Neb. 193, 302 N.W.2d 707 (1981).

Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. *In re Interest of Witherspoon*, 208 Neb. 755, 305 N.W.2d 644 (1981).

In the case at bar the evidence was clear and convincing and the trial court did not abuse its discretion in entering its order terminating parental rights.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

As I have on several previous occasions, I believe we have once again overreacted to a situation in affirming the trial court's action in terminating parental rights in this case. See, dissent of Krivosha,

C.J., *In re Interest of Cook*, 208 Neb. 549, 304 N.W.2d 390 (1981). It appears to me, in the instant case, we have once again appropriately declared that an order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209(6) (Reissue 1978) must be supported by clear and convincing evidence and then proceeded to terminate parental rights absent the necessary clear and convincing evidence.

There is no question but that the mother in the instant case experienced difficulties in raising her children. Before she was 19 she was the mother of three children and divorced from her husband.

But, as the majority notes, she apparently recognized her need to obtain some training so that she could provide for her children financially and emotionally. It is for that reason that she joined the military service and went on active duty, leaving her children with the State until she obtained the necessary training so she could return and provide a home for her children.

In the instant case there was no evidence of any physical abuse by the mother toward the children. It appears from the record that just at the time that the mother was ordered to give up her children she had made substantial strides in providing for her children. The record reflects that at the time of the termination hearing she had obtained housing for herself and her three children, obtained adequate furnishings for herself and her three children, cooperated fully with court personnel, and had obtained a marketable skill. It may very well be that we would wish for all families to be so constituted that all children enjoy all of the benefits that are often provided by well-trained, middle-class families. Such, however, is not the reality of life, and we should not be so quick to terminate parental rights because of a mother's inability to provide her children with as much as a potential adoptive parent might provide. I would have reversed and remanded.

CLINTON, J., joins in this dissent.

RICHARD V. SYAS, APPELLANT, V. NEBRASKA METHODIST HOSPITAL FOUNDATION, A CORPORATION, APPELLEE.

307 N.W.2d 112

Filed June 19, 1981. No. 43374.

1. **Directed Verdict.** The party against whom a verdict is directed is entitled to have all controverted facts resolved in his favor and to have the benefit of every reasonable inference deducible from the evidence.
2. **Negligence: Invitor-Invitee.** A possessor of land is not an insurer of the safety of business invitees on its land.
3. ____:____ A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (3) fails to exercise reasonable care to protect them against the danger.
4. **Trial.** Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Charles I. Scudder for appellant.

Ronald H. Stave and Joseph S. Daly of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

MORAN, District Judge.

This is appeal from a directed verdict for the defendant, Nebraska Methodist Hospital Foundation (hospital), after the plaintiff, Richard V. Syas (Syas), presented his evidence in a slip-and-fall case. The trial judge determined that Syas was guilty of contributory negligence to a degree sufficient to bar his right to recover from the hospital. We affirm.

As we must, we assume the truth of the material and relevant evidence presented by Syas, find every

controverted fact in his favor, and give him the benefit of every reasonable inference deducible from the evidence. *Crawford v. Soennichsen*, 175 Neb. 87, 120 N.W.2d 578 (1963).

On March 6, 1978, Syas drove from his home in Hancock, Iowa, to the hospital in Omaha, Nebraska, to pick up his teenage daughter who was to be released from the hospital that day after surgery performed the previous week. There was snow on the ground all the way. He arrived about 11 a.m. and parked his automobile in the hospital's parking lot where snow had been moved into piles. He entered the hospital and made arrangements for his daughter's discharge. He was told to bring his car to the second level entrance where hospital personnel would bring her. He returned to his car and drove up a private road to the second level. He had never used this road before. The lane nearest the entrance was a fire lane in which parking was prohibited, but was used as a pickup and dropoff area. There were parked cars in this lane, and there was evidence that this was a chronic situation which the hospital had not remedied. Syas stopped in the second lane opposite the entrance. The area was protected by a permanent canopy, and the pavement in that area contained an electrical heating system designed to prevent icing of water tracked onto the pavement by automobiles and melting snow which might blow onto the roadway under the canopy. The day was cold and windy. Climatological data showed air temperature at Eppley Airfield near Omaha on March 6, 1978, was 27 degrees at 9 a.m. and 33 degrees at noon. Syas testified that as he drove up the rampway everything looked normal. He saw no broken pieces of concrete, or chuckholes. He observed only two things: the cars parked in the fire lane and his daughter being wheeled outside the door in a wheelchair. Her leg was in a cast. Syas stopped his car in the second lane opposite the entrance and about 12 feet from his daughter, left the car, looked toward his daughter, took

two steps, slipped and fell to the roadway, and was injured. He attempted to rise, and slipped and fell again. While on the pavement Syas saw a combination of ice and water covering an area approximately 2 feet by 2 feet. A witness who testified she had no difficulty seeing it described it as "like a wet spot . . . that didn't have a lot of water on it but it had . . . frozen over the night. I don't know if you would call that ice or if you would call it frost. . . . It was wet." While walking, Syas did not look down to see the condition of the pavement. He testified that if he had looked, he probably would have seen the ice and walked around it or proceeded with caution. He thought the area would be clean because he had been told to go there to pick up his daughter and thought there would not be any ice there.

Hospital maintenance personnel called by the plaintiff testified to inspecting the area about an hour after the accident. They saw no ice. One witness testified the area was slippery from water where vehicles had traveled through it. Vapor was observed rising from the pavement, indicating the heating coils were functioning. There was no evidence of icing under the canopy before the accident or of complaints to the hospital in that regard.

Syas contends on appeal that there were jury questions of negligence and contributory negligence.

While the trial judge directed a verdict on the basis of Syas' contributory negligence, we think the case should be disposed of on the threshold question of the hospital's negligence.

The hospital was not an insurer of the safety of business invitees on its premises. *Jeffries v. Safeway Stores, Inc.*, 176 Neb. 347, 125 N.W.2d 914 (1964). The conditions of its liability to a business visitor are spelled out in NJI 8.22. This instruction tracks Restatement (Second) of Torts § 343 (1965):

"A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land

if, but only if, he

"(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

"(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

"(c) fails to exercise reasonable care to protect them against the danger."

Our cases are consistent. See, *Crawford v. Soennichsen*, 175 Neb. 87, 120 N.W.2d 578 (1963); *Brandert v. Scottsbluff Nat. Bank & Trust Co.*, 194 Neb. 777, 235 N.W.2d 864 (1975).

Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury. See *Crawford v. Soennichsen, supra.*

There are two inferences which can be drawn from the evidence. Either the heating system had malfunctioned and ice formed on the pavement or Syas slipped on water on the pavement, there because of vehicular traffic. If the first is true, there is no evidence of knowledge by the hospital of the condition or of a failure to exercise reasonable care to discover it. If the second inference is true, there is no evidence that the hospital should have expected Syas would not have discovered or realized the danger or would have failed to protect himself against it. See *Nance v. Ames Plaza, Inc.*, 177 Neb. 88, 128 N.W.2d 564 (1964). There was no issue of negligence by the hospital to submit to the jury.

Counsel for Syas has devoted a considerable portion of his brief and argument to the hospital's failure to keep open the pickup area near the entrance. We fail to see that this makes the rules in Restatement (Second) of Torts § 343 (1965) inapplicable.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I find that I must respectfully dissent from the majority's opinion in this case. I agree with the majority's conclusion that: "Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury." My difficulty with the majority's opinion, however, is its conclusion that the evidence in this case was such that reasonable minds could reach but one conclusion to the effect that the hospital should have expected Syas to have seen the defect and to have protected himself accordingly.

The evidence, as pointed out by the majority opinion, discloses that Syas stopped his car in the second lane opposite the entrance and about 12 feet from his daughter, left the car, looked toward his daughter, took *two steps*, slipped and fell to the roadway, and was injured. He attempted to rise, and slipped and fell again. I am unable to conclude how it can be said, as a matter of law, that the hospital could have reasonably expected that Syas would have discovered the danger. I find it not at all unreasonable to believe that Syas, concerned about the welfare of his recently injured daughter, might not have been able to discover the danger in just two steps. That is not to say that his failure to see the danger establishes negligence on the part of the hospital, but only to suggest that it created a question of fact. When different minds may reasonably draw different conclusions from the same facts as to whether they establish negligence or contributory negligence, such issues should be submitted to the jury. See, *Beck v. Trustin*, 177 Neb. 788, 131 N.W.2d 425 (1964); *Buie v. Beamsley*, 171 Neb. 181, 105 N.W.2d 738 (1960). In *Moats v. Lienemann*, 188 Neb. 452, 454, 197 N.W.2d 377, 379 (1972), we said: "'In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled

to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.'"

I would have submitted the issues of negligence and contributory negligence to the jury. For that reason, I would have reversed and remanded.

WHITE, J., joins in this dissent.

O'NEILL PRODUCTION CREDIT ASSOCIATION, APPELLEE, V. LARRY D. MITCHELL ET AL., APPELLANTS.

307 N.W.2d 115

Filed June 19, 1981. No. 43398.

1. **Equity: Appeal and Error.** In an equity action it is the duty of the Supreme Court to retry the issues of fact involved upon the evidence in the record and, upon such trial de novo, to reach an independent conclusion.
2. **Mortgages: Consideration.** A preexisting debt is a valuable and sufficient consideration for a mortgage given to secure that debt.
3. _____: _____. A real estate mortgage given to secure the preexisting debt of another is supported by valuable and sufficient consideration.
4. **Mortgages: Equity.** Although mortgage clauses which undertake to secure subsequent debts are not favored in equity and are carefully scrutinized and strictly construed, they will, in the absence of other legal prohibition, be enforced to the extent they are determined to have been within the intent of the parties.
5. **Mortgages: Acknowledgments.** A mortgage on real estate, other than as to the homestead, executed and delivered by the mortgagor is valid between the parties, even though it was not lawfully acknowledged.
6. **Homesteads: Estoppel.** Where the statutory requirements of signature and acknowledgment by both husband and wife to encumbrance of a homestead are wanting, they cannot be supplied by estoppel. An interest in the homestead simply will not pass nor be created unless the documents for that purpose are signed and acknowledged by both husband and wife.

Appeal from the District Court for Holt County:

HENRY F. REIMER, Judge. Affirmed in part, and in part reversed and remanded with directions.

William W. Griffin for appellants.

Edward E. Hannon for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and VAN PELT and CAPORALE, District Judges.

CAPORALE, District Judge.

The defendants-appellants, Larry D. and JoAnn Mitchell, husband and wife, and Larry's parents, Adrian L. and Eva L. Mitchell, husband and wife, are land contract vendees. The plaintiff-appellee, O'Neill Production Credit Association (Association), sought foreclosure of a lien claimed to have arisen by virtue of an assignment by the Mitchells of their interests in the land contract to the Association. The trial court found that a lien had been created and decreed foreclosure. For the reasons which follow, we affirm in part and reverse in part.

This is an action in equity; it is therefore the duty of the Supreme Court to retry the issues of fact involved upon the evidence in the record and, upon such trial de novo, to reach an independent conclusion. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980); *Parry v. State Farm Mut. Auto Ins. Co.*, 191 Neb. 628, 216 N.W.2d 875 (1974).

The evidence is not in conflict on the material issues. On March 9, 1967, the Mitchells, jointly and as tenants in common, entered into a contract with William J. and Elizabeth M. Meusch, husband and wife. Under the terms of that contract the Mitchells were to purchase certain land from the Meusches. Title was to be conveyed to the Mitchells when the extended installment payments due the Meusches were completed. A portion of the land which is the subject of the contract is the homestead of Larry and JoAnn.

The Association had lent money to Larry and JoAnn

in the past, and on January 22, 1975, took a promissory note from them, jointly and severally, in the amount of $325,000. On that same day, the Association presented an Assignment of Purchase Agreement (Assignment) to Larry. The Assignment undertook to "transfer, assign and set over" to the Association the Mitchells' title and interest in and to the land contract until an unspecified and unidentified "indebtedness, whether now owning or hereafter incurred, shall be satisfied and paid."

On February 11, 1975, Larry took the Assignment to a notary public. The notary certified that all four Mitchells had appeared before him and acknowledged the "instrument" to be their voluntary act and deed. JoAnn, Adrian, and Eva never appeared before the notary, nor were their signatures affixed to the Assignment when the notary signed his certificate. JoAnn did testify at trial that she had voluntarily and freely signed the Assignment.

Thereafter, between June 14, 1975, and June 21, 1976, the Association lent another $73,887.88 to Larry and an additional $19,160 to Larry and JoAnn. No money was ever lent by the Association to Adrian or Eva.

Appellants' assignments of error may be summarized as claiming that the trial court erred in determining that the Assignment was supported by valid consideration and in finding that JoAnn Mitchell was estopped to deny the validity of her acknowledgment with respect to the younger Mitchells' homestead interest.

It is clear that the assignment of the executory land contract between the Meusches and the Mitchells given to secure the debt in question is to be treated as a mortgage. *Grandjean v. Beyl*, 78 Neb. 349, 110 N.W. 1108 (1907); *Burrows v. Hovland*, 40 Neb. 464, 58 N.W. 947 (1894); *Scharman v. Scharman*, 38 Neb. 39, 56 N.W. 704 (1893). We have also held that a preexisting debt is a valuable and sufficient consideration for a mortgage given to secure that debt. *Longfellow v. Barnard*, 58 Neb. 612, 79 N.W. 255 (1899), *aff'd on rehearing*, 59 Neb.

455, 81 N.W. 307 (1899); *Morrill v. Skinner*, 57 Neb. 164, 77 N.W. 375 (1898); *Steen v. Stretch*, 50 Neb. 572, 70 N.W. 48 (1897). It is true that each of those cases is factually distinguishable from the one at bar. *Longfellow* involved the assignment by the mortgagee of a fraudulent mortgage to secure a creditor of the mortgagor. In *Morrill*, the property subject to the husband's mortgage was conveyed to the mortgagor's wife in a divorce settlement wherein the wife agreed to assume and pay the husband's mortgage and further gave her own separate mortgage and note. *Steen* presented a situation wherein the maker of a note later executed a mortgage to secure its payment to the mortgagee who had sold the note to another and agreed to forbear collection efforts. Nonetheless, the cases establish that a preexisting debt owed by the mortgagor to the mortgagee is valid consideration for a mortgage given to secure that debt. We have found no Nebraska case, and counsel have cited us none, which clearly holds that a real estate mortgage given to secure the preexisting debt of another is supported by valid consideration. However, it is generally held that the consideration required to support a mortgage need not flow from the mortgagee to the mortgagor; it is sufficient that the mortgagee parted with consideration. 55 Am. Jur. 2d *Mortgages* § 100 (1971); 59 C.J.S. *Mortgages* § 88 (1949). See, also, *Leach v. Treber*, 164 Neb. 419, 82 N.W.2d 544 (1957). It is likewise generally held that the consideration necessary to support a suretyship obligation need not pass directly to the surety; a consideration moving to the principal alone will suffice. 74 Am. Jur. 2d *Suretyship* § 14 (1974). Thus, a real estate mortgage given to secure the preexisting debt of another is supported by valuable and sufficient consideration. Consequently, the Assignment creates a valid lien as to the interests of Adrian and Eva with respect to the debt owed by Larry and JoAnn to the Association on February 11, 1975.

The matter of the loans made by the Association to Larry and JoAnn after February 11, 1975, is a different

question. The difficulty with those subsequent loans rests in the ambiguity of the Assignment. There can be no question as to what debt was being secured at the time the Assignment was executed, as only the one debt represented by Larry and JoAnn's joint note existed. However, as to "indebtedness . . . hereafter incurred," the Assignment identifies neither the nature of the future debt nor the future debtor. Although mortgage clauses which undertake to secure subsequent debts are not favored in equity and are carefully scrutinized and strictly construed, they will, in the absence of other legal prohibition, be enforced to the extent they are determined to have been within the intent of the parties. *Holiday Inns v. Sucher-Schaefer*, 77 Mich. App. 658, 259 N.W.2d 179 (1977); *Freese Leasing v. Union Trust & Sav. Bank*, 253 N.W.2d 921 (Iowa 1977); *First v. Byrne*, 238 Iowa 712, 28 N.W.2d 509 (1947); 59 C.J.S. *Mortgages* § 178 (1949). Here it cannot be said that the so-called dragnet clause contained in the Assignment clearly and unequivocally obligated Adrian and Eva to secure future indebtedness incurred by Larry and JoAnn, or by anyone else. The Assignment therefore created no lien against the interests of Adrian and Eva with respect to any money advanced by the Association after February 11, 1975. The foregoing conclusion makes it unnecessary for us to determine the applicability and effect, if any, of Neb. Rev. Stat. § 76-238.01 (Reissue 1976), which deals, among other things, with future advances on mortgaged real estate.

We now turn to the homestead interest. It is well established that a mortgage on real estate, other than as to the homestead, executed and delivered by the mortgagor is valid between the parties, even though it was not lawfully acknowledged. *Prudential Ins. Co. v. Holliday*, 191 Neb. 144, 214 N.W.2d 273 (1974); *Mitzner v. Putnam*, 186 Neb. 664, 185 N.W.2d 665 (1971). The question under the circumstances of this case is whether JoAnn is estopped from asserting the invalidity of her acknowledgment. We hold that she is not. Neb. Rev.

Stat. § 40-104 (Reissue 1978) provides, with certain exceptions not material here, that the homestead of a married person cannot be encumbered unless the instrument is executed and acknowledged by both husband and wife. It has long been the law of this state that where the statutory requirements of signature and acknowledgment by both husband and wife to encumbrance of a homestead are wanting, they cannot be supplied by estoppel. *Davis v. Thomas*, 66 Neb. 26, 92 N.W. 187 (1902); *Betts v. Sims*, 25 Neb. 166, 41 N.W. 117 (1888). See, also, *McIntosh v. Borchers*, 196 Neb. 109, 241 N.W.2d 534 (1976), *appeal after remand*, 201 Neb. 35, 266 N.W.2d 200 (1978). We see no reason to depart from that rule. An interest in the homestead simply will not pass nor be created unless the documents for that purpose are signed and acknowledged by both husband and wife. Thus, there can be no lien on that portion of the land contract interest which relates to the homestead of Larry and JoAnn.

Moreover, only $19,160 of the $93,047.88 lent by the Association after February 11, 1975, is JoAnn's debt; she did not join in the execution of the notes signed by Larry for the balance.

Accordingly, we affirm the decree of the trial court as to Adrian and Eva except as to the indebtedness incurred by Larry or Larry and JoAnn after February 11, 1975, in regard to which we reverse. We affirm as to Larry and JoAnn except as to the homestead interest, in regard to which we reverse. We also reverse as to JoAnn with regard to that portion of the indebtedness incurred after February 11, 1975, in which she did not join.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

GLADYS L. WYATT, EXECUTRIX OF THE ESTATE OF JOHN N. WYATT, DECEASED, APPELLANT. V. BURLINGTON NORTHERN, INC., ET AL., APPELLEES.

306 N.W.2d 902

Filed June 19, 1981. No. 43402.

1. **Railroads: Motor Vehicles: Negligence.** A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight as a matter of law and no recovery can be had for damages resulting from a collision with a passing train.
2. **Railroads: Motor Vehicles.** A motorist approaching a railroad grade crossing shall stop and not proceed across the crossing, until he can do so safely, if a train approaching within approximately one quarter mile of the crossing emits a signal audible from such distance, or the train is plainly visible and in hazardous proximity to the crossing. Neb. Rev. Stat. § 39-655(1) (Reissue 1978).
3. **Railroads: Motor Vehicles: Negligence.** The duty of a motorist approaching a grade crossing is such that even if the train fails to give warning signals of its approach to the crossing, the motorist can not recover if he recklessly fails and neglects to have his vehicle under control where by looking and listening at the proper time he could have seen the approaching train in time to stop before reaching the crossing.
4. **Railroads: Motor Vehicles: Right-of-Way.** There is no duty on the part of the engineer operating a railroad train to yield the right-of-way to a motorist approaching a grade crossing until the situation is such as to indicate to a reasonably prudent person that to proceed would probably result in a collision. At that time it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Wright & Simmons for appellant.

Knudsen, Berkheimer, Beam, Richardson & Endacott for appellee Burlington.

Holtorf, Kovarik, Nuttleman & Ellison, P.C., for appellee Shires.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This is an appeal in a wrongful death action. The plaintiff's decedent, John Wyatt, was killed in a railroad crossing accident when the pickup truck which he was driving south on 21st Avenue was struck broadside by an eastbound Burlington Northern train. The accident happened shortly after 5 p.m. on January 30, 1974, at the 21st Avenue crossing of the Burlington Northern tracks east of Scottsbluff, Nebraska. The defendants are the railroad company and the engineer, John G. Shires.

At the close of the plaintiff's evidence the trial court dismissed the plaintiff's amended petition on the motions of the defendants. The plaintiff has appealed. The assignments of error relate to the dismissal of the petition and the refusal of the trial court to admit documentary evidence containing statistical information concerning railroad crossing accidents and fatalities.

The record shows that 21st Avenue, also known as the sugar factory road, is a two-lane gravel road running north and south. The railroad tracks run slightly southeast to northwest and cross 21st Avenue at an angle of approximately 67 degrees. The crossing was marked by a standard railroad crossbuck sign which was located just north of a spur track or siding which crossed 21st Avenue approximately 15 feet north of the main line track. A second siding or spur track that leads into the sugar factory crosses 21st Avenue approximately 760 feet north of the main line track. The sugar factory spur was marked by a separate warning sign. A paved highway known as the South Beltline Highway, runs parallel to the main track and approximately 100 feet south. A stop sign on 21st Avenue protects the intersection at the Beltline highway.

There is a "dump" or raised area consisting of dirt, rock, and pieces of metal west of 21st Avenue and north of the tracks which to some extent obstructs the vision of traffic approaching the crossing from the north. The evidence, however, is undisputed that from a point 300 feet north of the crossing Wyatt had a clear and unob-

structed view of the track from the crossing west to a point 400 feet west of the crossing.

The train which was involved in the accident consisted of an "SD" type diesel engine, a loaded hopper car, and a way car or caboose. The entire train was approximately 134 feet long and 14 feet high. The train had left Bayard, Nebraska, that morning and proceeded west to Morrill, Nebraska. The train was returning to Bayard, Nebraska, when the accident happened. The locomotive had only one set of controls and when operated with the short hood forward the controls were on the right side of the locomotive. Since there were no facilities to turn the locomotive at Morrill, the locomotive was operated with the long hood forward on the return trip to Bayard, Nebraska.

The engineer in charge of the locomotive at the time of the accident was the defendant Shires, but the locomotive was actually being operated by the fireman, James Butcher. The engineer's seat was constructed so that it would slide forward or backward and swivel to the right or left. To operate the locomotive with the long hood forward, Butcher turned the engineer's seat and slid it back toward the short hood so that he could look in the direction that the locomotive was traveling.

As the train approached the 21st Avenue crossing, it was proceeding at a speed of approximately 26 to 28 m.p.h. The warning bell and the headlight were operating. The locomotive was also equipped with either a flashing amber light on top of the cab or an oscillating headlight, which was operating. At the whistle post approximately 1,200 feet west of the crossing, Butcher began to blow the whistle and continued to do so until the locomotive reached the crossing.

Both Shires and Butcher were looking out the windows of the cab of the locomotive to the northeast and saw Wyatt approaching the crossing from the north at a speed of approximately 30 m.p.h. or better. Shires testified that when the locomotive was 200 feet or less west of the crossing, Wyatt was approximately 300 feet north

of the crossing. At that time Shires said to Butcher, "I don't think he's going to stop." At about the same time Butcher placed the brakes in "emergency" which resulted in a maximum application of the brakes to all wheels of the train and disconnected the power in the locomotive from the traction motors. Wyatt did not slow down or stop and the collision occurred.

Although the sun was shining, it was low in the southwest and at such an angle that Wyatt would have had to look to the right of the sun to see the train. Both Shires and Butcher testified that they watched Wyatt from the point 300 feet north of the crossing, and Wyatt did not look to the west and did not slow down as he approached the crossing. After the accident there were no skid marks or other indication that Wyatt had attempted to stop.

The trial court sustained the motions of the defendants for a directed verdict and dismissed the petition on the ground that the plaintiff's decedent Wyatt was guilty of contributory negligence more than slight as a matter of law.

The rules which are applicable to motorists approaching railroad grade crossings in this state are well settled. In *Thomas v. Burlington Northern R.R., Inc.*, 203 Neb. 507, 510-11, 279 N.W.2d 369, 372 (1979), we said: "It is a well-established rule in Nebraska that a traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train. Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., 161 Neb. 451, 73 N.W.2d 679. See, also, Loudy v. Union P. R. R. Co., 146 Neb. 676, 21 N.W.2d 431; McIntosh v. Union P.R.R. Co., 146 Neb. 844, 22 N.W.2d 179; Mundt v. Chicago, R. I. & P. R. Co., 136 Neb. 478, 286 N.W. 691;

Moreland v. Chicago & N. W. R. Co., 117 Neb. 456, 220 N.W. 692; Askey v. Chicago, B. & Q. R. Co., 101 Neb. 266, 162 N.W. 647; Chicago, B. & Q. R. Co. v. Schwanenfeldt, 75 Neb. 80, 105 N.W. 1101."

Neb. Rev. Stat. § 39-655(1) (Reissue 1978), enacted in 1973, provides in part: "(1) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances set forth in this section, the driver of such vehicle shall stop within fifty feet but not less than fifteen feet from the nearest rail of such railroad and shall not proceed until he can do so safely. The requirements of this subsection shall apply when: . . . (c) A railroad train approaching within approximately one quarter mile of the highway crossing emits a signal audible from such distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard; or (d) An approaching railroad train is plainly visible and is in hazardous proximity to such crossing."

The statute was clearly applicable to Wyatt in this case. The train was "plainly visible" and had emitted a signal within approximately one quarter of a mile of the crossing which was audible from that distance.

The duty of a motorist approaching a grade crossing is such that even if the train fails to give warning signals of its approach to the crossing, the motorist can not recover if he recklessly fails and neglects to have his vehicle under control where by looking and listening at the proper time he could have seen the approaching train in time to stop before reaching the crossing. *Milk House Cheese Corp. v. Chicago, B. & Q.R.R. Co.*, 161 Neb. 451, 73 N.W.2d 679 (1955).

The ordinary rules of the road which are applicable to motor vehicles crossing at highway intersections have no application to railroad trains approaching grade crossings. Although railroad trains may not have an absolute right-of-way at grade crossings under all conditions, there is no duty on the part of the engineer operating the train to yield the right-of-way until the situation

is such as to indicate to a reasonably prudent person that to proceed would probably result in a collision. At that time it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way. *Carter v. Chicago, B. & Q.R.R. Co.*, 175 Neb. 188, 121 N.W.2d 44 (1963). The defendants in this case complied fully with these rules and did everything possible in an effort to stop the train when it became reasonably apparent that Wyatt might not stop before reaching the crossing.

Much of the plaintiff's argument is directed to her contention that Wyatt was hard of hearing and may not have heard the whistle or warning bell because he was probably driving the truck with the windows closed and the radio turned on at a high volume. This, of course, would not excuse the decedent but merely tended to prove contributory negligence. If Wyatt was hard of hearing he was under an obligation to maintain an increased vigilance for warning signals. To place himself in a situation where he would be unable to hear warning signals would not be a defense or excuse for his failure to use due care.

The plaintiff further argues that the sun, which was low in the west, may have prevented the decedent from clearly seeing the train, which was in plain sight. The sun was a condition and, like snow, fog, or blinding lights, would not excuse Wyatt's failure to see the train. *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 255 N.W.2d 272 (1977).

The evidence shows, quite conclusively, that Wyatt drove his truck onto the crossing directly in front of the train in total disregard of the crossing sign and all of the warning signals which were being given by the railroad employees. In fact, the evidence indicates that it is probable that Wyatt would not have been able to stop at the stop sign at the Beltline highway intersection. From a point approximately 300 feet north of the crossing, Wyatt did not look to the right or make any attempt to slow down or stop before reaching the railroad crossing.

The failure to maintain a proper lookout and control over his vehicle was contributory negligence more than slight as a matter of law and sufficient to bar any recovery.

Although the motion was sustained on the basis of the contributory negligence of the deceased, there was no substantial evidence of negligence on the part of the railroad company and its employees. The train was being operated in a careful manner and at a reasonable rate of speed. When it appeared that the decedent would not stop before reaching the crossing, the train brakes were placed in "emergency" in an effort to avoid the accident.

The documentary evidence the plaintiff attempted to introduce, which contained statistical information concerning grade crossing accidents and fatalities, was not relevant to any issue before the court and was properly excluded.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FREDERICK WHITE, APPELLANT.

306 N.W.2d 906

Filed June 19, 1981. No. 43573.

1. **Arrests: Words and Phrases.** An arrest is taking custody of another person for the purpose of holding or detaining him to answer a criminal charge. It is defined as the taking, seizing, or detaining of the person of another.
2. **Arrests.** To effect an arrest there must be actual or constructive seizure or detention of the person arrested, or his voluntary submission to custody, and the restraint must be under real or pretended legal authority.
3. ____. Constructive, as distinguished from physical, restraint sufficient to constitute a constructive seizure or detention of an arrestee exists where an officer has the intention to effect an arrest, that intention has in some way been communicated to the arrestee, the arrestee understands that he is under legal restraint, and the officer has the apparent present power to

control the person even though he has not yet asserted physical control.

4. ——— A touching is not necessarily essential to effectuate an arrest.
5. **Criminal Law: Evidence.** It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.
6. **Lesser-Included Offense: Arrests.** A lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Resisting arrest is not a lesser-included offense of escape for, among other reasons, the crime of escape does not necessarily involve the use of force.
7. **Criminal Law: Prosecuting Attorneys: Constitutional Law.** So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file, generally rests entirely in his discretion. Within the limits set by the Legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The defendant was tried before a jury on a charge of escape from official detention. Neb. Rev. Stat. § 28-912 (Reissue 1979). The information alleged that on a certain date the defendant unlawfully removed himself from official detention while he was under arrest for a felony. He was also charged with being an habitual criminal. He was found guilty by the jury on the charge of the escape and by the court on the habitual criminal

charge, and sentenced to a term of 10 years' imprisonment.

On appeal to this court, he assigns and argues the following claims of error: (1) The evidence was insufficient to support the finding of guilt on the escape charge and the court erred in not granting the defendant's motion for a directed verdict; (2) The instruction defining arrest was erroneous; (3) The defendant was denied a fair trial because of repeated references during trial to the reason for the arrest; (4) The court erred in not granting the defendant's request for an instruction permitting the jury to find the defendant guilty of "the lesser-included offense" of resisting arrest; and (5) The court erred in finding the defendant guilty on the habitual criminal charge because the habitual criminal statute is unconstitutional as applied.

The first two assignments are closely related and may be conveniently considered together.

Section 28-912, insofar as applicable here, provides that "[a] person commits escape if he unlawfully removes himself from official detention . . . . Official detention shall mean arrest . . . ." The defendant argues that the evidence was insufficient to permit the jury to find that the defendant was under arrest at the time of his "escape," and that in the instruction to the jury defining arrest, the court should have included, in accordance with the defendant's request, the words, "mere words are not enough" to constitute an arrest. He does not otherwise attack the instruction. The instruction given was the following: "Arrest: An arrest is taking custody of another person for the purpose of holding or detaining him to answer a criminal charge. It is defined as the taking, seizing, or detaining of the person of another, (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested.

"To effect an arrest, there must be actual or con-

structive seizure or detention of the person arrested, or his voluntary submission to custody, and the restraint must be under real or pretended legal authority. There can be no arrest where there is no restraint or where the person sought to be arrested is not conscious of any restraint. If the person arrested understands that he is in the power of the one arresting and submits in consequence, it is not necessary that there be an application of actual force, in manual touching of the body, or a physical restraint that may be visible to the eye. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested. In all cases in which there is no manual touching or seizure, or any resistance, the intention of the parties are important. There must have been the intention on the part of one of them to arrest the other and the intent on the part of the other to submit, under the belief and impression that submission was necessary. However, no formal declaration of arrest is required."

The arresting officer, Spanel, testified that he and a fellow officer, both in plain clothes and in an unmarked car, were making an investigation of a sexual assault alleged to have occurred earlier. Their particular assignment was to procure an identification of the suspect who had been described by the victim as a black male in his 20s, bearded, height 5 feet 6 inches to 5 feet 9 inches, and weighing 140 to 160 pounds. The suspect also had upon his left forearm some unusual markings consisting of scar tissue or other unusual discoloration of the skin. The officers had a composite drawing of the facial features of the suspect made from information given by the victim. The suspect wore metal-rimmed spectacles.

At about 9:55 p.m. on August 17, 1979, the two officers were operating in the neighborhood of 24th and Q Streets in the city of Lincoln. Officer Spanel was seated in the automobile. His companion officer was at an apartment in the vicinity to check out information

they had received from a member of the black community a short time earlier. While Spanel was seated in the automobile he observed two black males, one of whom was the defendant White, approach on 24th Street. When they neared the automobile Spanel called to them, asking: "Have you guys got a minute?" The two young men came toward the car. Spanel got out of the vehicle and identified himself as a police officer by showing his official identification card and badge. He then explained that he was investigating a sexual assault and handed to defendant's companion, Nevins, the composite drawing and asked if he could identify the individual or knew anyone looking like the picture. Nevins indicated he could not. Then either Nevins or the officer handed the drawing to defendant. As defendant extended his arm to take the photograph, his forearm projected from underneath his sleeve and Spanel observed on the forearm markings which resembled those which the victim had described. Defendant otherwise matched the description of the suspect. Spanel, without waiting for comment by defendant, took back the photograph and immediately announced that defendant was under arrest for a felony offense, describing it by name, and indicated that he would have to come to headquarters.

At this time arises a conflict in the evidence. Spanel testified that he reached into the car for his radio transmitter and sent a message asking for assistance. At about the same time he called to Officer Lutz, his companion, to assist him. All of this, he said, took from 15 to 30 seconds, during which time defendant remained in position. When Spanel turned back toward defendant, the latter struck him twice with his fist, once in the face and once on the shoulder. Defendant did not testify. Nevins testified that Spanel asked them both to look at the picture and asked if they knew anyone or had seen anyone who looked like that. Nevins responded "no." Defendant reached out and took the picture. As he did so Spanel announced that he was going to take de-

fendant down to the station. Two or three seconds elapsed and then defendant struck the officer twice and fled. It was not until after that that the officer reached into the car and called for a backup unit.

Spanel testified that he made the call for the backup unit after announcing the arrest because he did not want to transport defendant in an unmarked car. He said he did not attempt to place his hands upon defendant because it was his understanding that some black persons resented being touched in sensitive situations.

Defendant was pursued by Spanel and other officers and surrendered about 2 blocks from the place where the action began. He did so at that time without resistance. The officer who assisted Spanel testified: "I heard a call of an officer in foot pursuit and requesting assistance. It was not clear to me which officer it was." He did not recall hearing other requests, just transmissions indicating direction of travel and location. Defendant argues this conclusively establishes that defendant's version of the order of events is the correct one.

It is not for this court to decide the disputed questions of fact, nor to determine precisely what occurred or the order of events. The only questions before us on the first two assignments are questions of law: First, did the trial court err in not including in instruction No. 9 the phrase, "mere words are not enough" to constitute an arrest? Second, was the evidence sufficient to permit the jury to find that the defendant was under arrest when he fled?

The answer to these questions depends, we believe, for reasons hereinafter set forth, upon what is meant by constructive seizure or detention.

It may seem strange but it is true that even after 200 years of history in this country there is still some dispute about what constitutes an arrest and the legal consequences which flow from it. If anything, the complexities of the problem are increasing; the result, in a

large degree, of the interaction of the law of arrest and exclusionary rules as well as the distinction between an investigative detention and arrest within the meaning of the fourth amendment.

The defendant's contention that he was not under arrest is, in the language of his brief, based on the following premise: "[T]here was a total failure of competent proof to support the material allegations that the defendant was under arrest. Defendant respectfully submits that there was no evidence on which to believe that he was subjected 'to the actual control and will' of Officer Spanel. The only act of dominion or order made by the officer was for defendant to accompany him downtown. The defendant forcefully rejected this request. The defendant did not in fact go with the officer until after the chase.

"Defendant's slight pause before the chase began is hopelessly ambiguous. [Citations omitted.] There is no evidence that defendant understood himself to be in the power of the officer or that he submitted or consented to being restrained."

The instruction earlier quoted and given by the court in this case appears to be essentially the one approved by this court in *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974).

All courts agree that one of the elements necessary to effectuate an arrest is "actual or constructive seizure or detention of the person."

We hold that constructive, as distinguished from physical, restraint sufficient to constitute a constructive seizure or detention of an arrestee exists where an officer has the intention to effect an arrest, that intention has in some way been communicated to the arrestee, the arrestee understands that he is under legal restraint, and the officer has the apparent present power to control the person even though he has not yet asserted physical control. *State v. Vaughn*, 12 Ariz. App. 442, 471 P.2d 744 (1970); *State v. Parnell*, 221 So. 2d 129 (Fla. 1969); *Bey v. State*, 355 So. 2d 850 (Fla. App. 1978);

State v. Rocheleau, 117 N.H. 792, 378 A.2d 1381 (1977); *State v. Donahue*, 420 A.2d 936 (Me. 1980); *Price v. United States*, 119 A.2d 718 (D.C. 1956).

The evidence in this case was sufficient to permit the jury to find that constructive restraint existed. It is not disputed that the officer announced the arrest and that the physical proximity of the officer and the defendant were such that the officer could have, had he so chosen, attempted to exert physical control; that the defendant knew he was under legal restraint and not free to leave is evidenced by the fact that he obviously felt it necessary to assault the officer in order to effectuate his freedom of movement. A few courts have held that there must exist at least some slight touching by the officer to effectuate an arrest. We reject the necessity of such an act. An arrestee has a legal obligation to surrender himself to an officer who has properly identified himself and has announced the arrest.

Some courts, even those whose definition of effectuating an arrest includes constructive constraint, announce the rule that mere words cannot constitute an arrest. See, e.g., *State v. Powers*, 386 A.2d 721 (Me. 1978). That opinion, however, is somewhat confusing in that it seems to approve a lower court charge that an actual touching is not necessary to effectuate an arrest. Whether or not mere words can constitute constructive restraint will necessarily depend upon the facts of the case. If the circumstances are such that the arresting officer has no reasonable present capability to exercise physical control, then mere words may not constitute a constructive restraint. Under the particular evidence in this case, the court did not err in refusing to include in the instruction the phrase, "mere words cannot constitute an arrest." We note that it is legislative policy that force is not to be used in making an arrest unless the "actor believes that such force is immediately necessary to effect a lawful arrest." Neb. Rev. Stat. § 28-1412(1) (Reissue 1979).

The defendant contends that he was deprived of a fair trial because of testimony that he was arrested for a

felony and by references by the prosecution in argument and in questions that the arrest was for a felony. Defendant's argument is that Neb. Rev. Stat. § 27-404(2) (Reissue 1979), limiting the purposes for which evidence of other crimes is admissible, barred the testimony and the remarks. Section 27-404(2) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

That statute is irrelevant. The court charged the jury on the elements of the crime as follows: "1. That on or about August 17, 1979, the defendant, Fred White, was under official detention on a felony charge in Lancaster County, Nebraska,

"2. That on said date said defendant did unlawfully remove himself from such official detention."

Section 28-912, which defines the crime of escape, provides in subsection (5): "Escape is a Class III felony where: (a) The detainee was under arrest for or detained on a felony charge or following conviction for the commission of an offense . . . ." Except as provided in subsection (5), escape is a Class IV felony. The information had originally charged that he removed himself from official detention while under arrest under a charge of first degree forcible sexual assault. On defendant's motion before trial, the words "first degree forcible sexual assault" were stricken, leaving only the words "on a felony charge."

Being under detention for a felony was an element of the degree of crime charged and it was necessary for the State to prove the same. It was relevant and material that it be proved by the testimony and it was proper to refer to it in questioning and argument. The defendant would have had a right to complain had it not been proved. "It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the

crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes." *State v. Knecht*, 181 Neb. 149, 157, 147 N.W.2d 167, 173 (1966). The contention is without merit.

The defendant requested that the jury be charged on the "lesser-included offense" of resisting arrest. This contention is without merit.

Neb. Rev. Stat. § 28-904 (Reissue 1979) defines the crime of resisting arrest. It provides, insofar as is relevent here: "(1) A person commits the offense of resisting arrest if, while intentionally preventing or attempting to prevent a peace officer, acting under color of his official authority, from effecting an arrest of the actor or another, he:

"(a) Uses or threatens to use physical force or violence against the peace officer or another; or

"(b) Uses any other means which creates a substantial risk of causing physical injury to the peace officer or another; or

"(c) Employs means requiring substantial force to overcome resistance to effecting the arrest."

The crime of escape may, but does not necessarily, include the use of force. Neb. Rev. Stat. § 28-913 (Reissue 1979).

In *State v. Colgrove*, 197 Neb. 375, 376, 248 N.W.2d 780, 781 (1977), as well as in several other recent cases, we have defined lesser-included offense as: "A lesser included offense is one which is necessarily established by proof of the greater offense. [Citation omitted.] To be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser."

It should be observed that some of the cases we have cited in connection with assignments (1) and (2) have noted that arrest is not only an act that occurs at a particular time but also a process or a state that may continue for a period, e.g., until incarceration or release

on bail.

This appears to be one of those cases where, under the particular state of the evidence, the prosecutor might have had a choice of charging either escape or resisting arrest, but could not, under the particular facts, have charged and convicted of both. The State took the risk of an improper choice and gets the benefit of choosing correctly. The court did not err in refusing to include an instruction on lesser-included offense.

The defendant's last assignment urges that the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), is unconstitutional as applied and violates the due process clause of the U.S. Constitution because the prosecutor's discretion as to whether or not to file the habitual criminal count in a particular case is not subject to statutory standards or judicial review. The full scope of the defendant's argument is set forth in Note, *A Closer Look at Habitual Criminal Statutes*, 16 Am. Crim. L. Rev. 275 (1979). Neither the defendant nor the author of the article cites any case authority to support the proposition. We have rejected similar arguments. *State v. Martin*, 190 Neb. 212, 206 N.W.2d 856 (1973). The Supreme Court of the United States, in *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978), has said: "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" There is no evidence in the record to indicate that the discretion in this case was based upon any such unjustifiable

standard. The defendant's last assignment is not meritorious.

AFFIRMED.

McCOWN, J., concurs in result.

IN RE INTEREST OF CHANDRA LOUISE KAIN AND MELODY RENEE KAIN, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BARBARA KAIN, APPELLANT.

307 N.W.2d 119

Filed June 19, 1981. No. 43732.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. The trial court's findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
2. **Parental Rights.** When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final disposition be made without delay.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Michael Kelley of Kelley & Kelley for appellant.

Donald L. Knowles, Douglas County Attorney, and Christopher E. Kelly for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, McCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Barbara Kain, appellant and natural mother herein, appeals to this court from an order entered by the separate juvenile court of Douglas County, Nebraska, termi-

nating her parental rights to Chandra Louise Kain, born April 20, 1974, and also to Melody Renee Kain, born June 29, 1977. We affirm.

The record in this case indicates that on April 10, 1978, the Douglas County attorney filed a petition in the juvenile court which alleged that Chandra and Melody were children within the meaning of Neb. Rev. Stat. § 43-202(1) (Reissue 1978) in that they were both under the age of 18 years, homeless or destitute, and without proper parental support. The petition further alleged that the children were within the meaning of § 43-202(2)(c) in that Barbara Kain, natural mother of said children, either "neglects, is unable to, or refuses to provide proper necessities of subsistence, education, or other care necessary for the health, morals, or well-being of said children . . . ." On that same date, the juvenile court ordered that temporary custody of the children should be placed with Douglas County Social Services. On April 25, 1978, a detention hearing was held, following which the juvenile court ordered that the children be placed in an appropriate foster care facility, and that Barbara be granted reasonable rights of visitation.

On June 14, 1978, an adjudication hearing was held, at which time Barbara admitted to those portions of the petition which alleged that she had left her children without adult supervision for extended periods of time. The hearing was continued until October 2, 1978, at which time, based on the allegations contained in the petition which were admitted to by their natural mother, the court found the children to be within the meaning of § 43-202(1). On that date, the court ordered that Barbara: "a. Continue her counseling at Child Saving Institute; b. Maintain suitable housing; c. be allowed one day a week visitation, as arranged by Douglas County Social Services . . . ."

It next appears that a motion for review was filed by the children's guardian ad litem on January 26, 1979. The motion requested a hearing based upon a report the guardian ad litem had received from Dr. Thomas Jae-

ger, a child psychiatrist who was treating Barbara and her children. The psychiatric report, admitted as exhibit 2, stated:

"I've had occasion to see Chandra in individual play therapy during the past several months and find that she essentially presents as a 4 year old girl who falls in a category of children who are psycho-socially deprived. In addition, she manifests considerable anxiety secondary to the psycho-social deprivation that she has incurred as well as by a withdrawing behavior whenever this level of anxiety becomes too overwhelming for her.

"During the time that I have seen her in individual play therapy, the repeated leitmotif is often the fact that Barbara (her biological mother) has hit her for one reason or another during the times that she stays with her on weekends and holidays. This has come up on more than one occasion and on the last visit after careful inspection by both myself, our receptionist and the driver for Douglas County Social Services, there was a notable bruise on the right lateral side of the thigh which could only have been incurred as a result of her being hit with a metallic object such as the buckle of a belt. There were also some numerous marks over her body as well.

"The fact that this seems to be occurring on a regular basis at least according to what Chandra is telling me, leaves me with a very uneasy feeling. I believe that this child is a probably [sic] candidate for further serious abuse if this type of behavior that her mother's demonstrating is allowed to continue."

A hearing on the motion filed by the guardian ad litem was held on February 12, 1979, at which time the court ordered that Barbara continue counseling sessions with the Child Saving Institute. The court also ordered that overnight visitations by Melody should continue, but that such visitations by Chandra should be discontinued. The next hearing in this matter was held on May 8, 1979, on the oral motion of the guardian ad litem that all visitation in the home of the children's

mother be suspended. The motion was sustained by the juvenile court and all overnight visitations with Barbara were discontinued.

On September 20, 1979, another hearing in this matter was held, at which time the court found that the best interests of the children would be served by placing them in the temporary custody of the Nebraska Department of Public Welfare for foster care. In addition, the court ordered that Barbara: "a. Maintain suitable housing; b. Maintain suitable employment; and c. continue counseling with Thomas Jaeger, M.D. on behalf of her daughter, Chandra Louise Kain."

On January 21, 1980, the Douglas County attorney filed a motion for termination of parental rights, which alleged as follows: "That Chandra Louise Kain and Melody Renee Kain come within the meaning of Nebraska Revised Statutes, 1943, Section 43-209(6), Reissue 1978, because reasonable efforts, under the direction of the Court, have failed to correct the conditions leading to the aforementioned determination, towit: A. That Barbara Kain, natural mother of said children, maintain suitable housing. Barbara Kain failed to obtain and/or maintain suitable housing. On November 22, 1979, the service officer made independent inquiries and located a home for Barbara Kain. The residence has subsequently been in a state of disarray and without an adequate food supply during the visits of said children. B. That Barbara Kain, natural mother of said children, maintain stable employment. Barbara Kain has failed to obtain and/or maintain stable employment. C. That Barbara Kain, natural mother of said children, continue counseling with Dr. Jaeger. Barbara Kain has missed only one counseling session, but the therapist states that Barbara Kain is not capable of long range planning in her own life, and in the absence of major human services intervention is likely to become more ineffectual at her own maintenance, as well as that of said children."

A hearing on the motion was commenced on Febru-

ary 4, 1980, and was continued to a later date. Subsequent hearings were held before the juvenile court on April 21, 1980, May 14, 1980, June 30, 1980, and July 3, 1980. Testimony was presented before the court by witnesses during the aforementioned hearings, and the motion of the Douglas County attorney was thereafter taken under advisement by the court. On August 13, 1980, the court entered an order finding that the allegations of the motion pertaining to Barbara were true, and that Chandra and Melody were children within the meaning of Neb. Rev. Stat. § 43-209(6) (Reissue 1978) in that reasonable efforts had failed to correct the conditions leading to the juvenile court's determination that the children were within § 43-202(1). The court ordered that the parental rights of Barbara be terminated. A subsequent motion for new trial was overruled, and the appellant now appeals to this court.

In her brief on appeal, Barbara assigns as error: (1) The court erred in finding that the termination of her parental rights was in the children's best interests; and (2) The court erred in finding sufficient evidence to support the termination order.

The applicable rules of law are well established. An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. Also, the trial court's findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion. *In re Interest of J.L.L.*, *ante* p. 76, 306 N.W.2d 175 (1981); *In re Interest of McKee*, 208 Neb. 623, 304 N.W.2d 918 (1981); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981); *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979).

Neb. Rev. Stat. § 43-209 (Reissue 1978), the section dealing with the termination of parental rights, reads in pertinent part as follows: "The court may terminate all parental rights between the parents or the mother of a

child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist: . . . (6) Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."

We have reviewed the record in the present case and have concluded that the evidence contained therein amply supports the decision of the juvenile court to terminate the parental rights of Barbara. Dr. Thomas Jaeger, the child psychiatrist mentioned above, testified that he has had contact with Chandra since October 10, 1978, and with Melody since October 2, 1979. He stated that Chandra was a child who has insufficient stimulation and suffered psychological deprivations from the lack of parental interest expressed from her mother. Dr. Jaeger testified as follows: "When I saw her initially, she presented as a rather bizarre child, almost to the point, that in my differential, I was suspicious she was suffering from a thought disorder. That means, at that time, things were not following sequentially, things were not in order. She had problems with anuresis and copresis, had been soiling in her pants, and bed wetting in the day as well as the night, seemed extremely anxious, physiologically." He also stated that he found similar conditions with Melody.

As to Barbara, Dr. Jaeger stated that in his opinion he did not believe she has the capacity to be an effective parent. He testified: "As far as the sessions went on, I did notice when I would — I suppose I would call a more detached attitude toward the children. By that I mean, that at times, although Mrs. Kain was there in body, at times she seemed indifferent to what was going on with the children and amongst themselves, especially at times when they naturally might either get rambunctious or have a particular need that needed attending to. It seemed to me that at times we would have to remind

Mrs. Kain that perhaps one or the other needed to be taken care of even as far as physical needs." Dr. Jaeger did express encouragement, however, with the progress the children have made while in foster care.

Bonnie Bremer, a caseworker with Child Protective Services of Douglas County, testified that she worked with Barbara in an attempt to help Barbara rehabilitate herself and to meet the court order. She found that Barbara would not care for herself and stated that she made little effort to meet the requirements set by the juvenile court. Bremer stated that Barbara Harris, the court service officer, found the house where Barbara Kain lives, but that the appellant failed to maintain the house. Bremer testified that she had to assist Barbara in going to the store in order that adequate food would be in the home for the children's visitations. She also stated that during such visitations there was little interaction between the mother and children.

Barbara Harris, service officer with the juvenile court, testified that she explained the rehabilitation plan with Barbara Kain numerous times, and made many home visits over a 2-year period. She testified that Barbara exhibited little interaction with the children. This observation was also expressed by Margaret Mullins, a psychologist at Richard Young Hospital, who administered tests to Barbara and watched her behavior with her children.

The trial court found that the termination of the parental rights was justified, basing its decision on the evidence that 2 years had passed since the petition in this case was filed and that Barbara was unable to rehabilitate herself during that time. This court has held that when natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final disposition be made without delay. *In re Interest of McKee, supra*; *State v. Chant*, 202 Neb. 750, 277 N.W.2d 97 (1979). That, unfortunately, is the situation in this case.

We conclude that the action taken by the separate juvenile court was correct and supported by the evidence appearing in the record. The judgment of the juvenile court must be affirmed.

AFFIRMED.

JESSIE L. AKINS, APPELLANT, V. HAPPY HOUR, INC., ET AL., APPELLEES.

306 N.W.2d 914

Filed June 19, 1981. No. 43765.

1. **Workmen's Compensation: Words and Phrases.** "Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.
2. **Workmen's Compensation: Second Injury Fund.** Under Neb. Rev. Stat. § 48-128 (Reissue 1978), if an employee who has a preexisting permanent partial disability which was known to the employer prior to the occurrence of a subsequent compensable injury receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury considered alone and of itself, the employer at the time of the last injury is liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated from the Second Injury Fund.
3. ____: ____. The purpose of Neb. Rev. Stat. § 48-128 (Reissue 1978) is not to provide compensation for the previous disability but to provide compensation for permanent partial or total disability resulting from a combination of the previous fact condition with a compensable injury. It is the previous fact condition combined with a second compensable injury causing permanent partial or total disability in fact that establishes the right of the employee to compensation from the Second Injury Fund.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and remanded with directions.

Robert C. Wester of Schirber Law Offices, P.C., for appellant.

Hensen & Engles, P.C., for appellee Happy Hour.

Paul L. Douglas, Attorney General, and John R. Thompson for appellee State.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is a workmen's compensation case involving an award against the Second Injury Fund.

The plaintiff was born January 28, 1926. He has a fifth grade education. He lost his left arm at the elbow in an automobile accident in 1952. His employer made arrangements for him to continue working after the automobile accident until the plant was later closed. Thereafter plaintiff worked in various restaurants and bars until 1964 when he purchased the Happy Hour lounge in Omaha, Nebraska. In 1976 he sold the lounge and was retained by the purchaser as an employee with his main duties consisting of running the kitchen and occasionally the bar.

On August 17, 1978, plaintiff sustained a severe cut between the thumb and index finger of his right hand while he was washing dishes. He underwent surgery on two occasions, but the severed tendon did not knit. The stipulated medical testimony is that the second injury resulted in a 45 to 55 percent disability of the thumb, which translates to a 10 to 12 percent disability of the body as a whole. The total physical disability suffered from the combined injuries is a 62 percent permanent disability of the body as a whole.

Plaintiff returned to work in January 1979 and worked until April 1979 when the lounge was closed. Between April 1979 and July 1979, the plaintiff sought employment and applied to between 25 and 30 restaurants but was unsuccessful. In July 1979 plaintiff ultimately obtained a job at a Howard Johnson restaurant, running the kitchen on the midnight shift. Plaintiff is unable to open jars, open the freezer door,

clean the meat slicer, or pick up small objects. Nevertheless, plaintiff has been able to retain his job at Howard Johnson's with some assistance from other employees, and was earning as much or more than he was earning at the time of the injury to his thumb.

The Workmen's Compensation Court, at the initial hearing, found that the second injury resulted in a permanent partial disability to the plaintiff's right thumb, which, combined with the loss of his left arm in the prior accident, resulted in a 59 percent permanent partial disability to the body as a whole, and that plaintiff had suffered a substantially greater disability than that which would have resulted from the second injury considered alone and of itself. The court awarded plaintiff a 12 percent disability to the body as a whole for the second injury alone against the employer and its insurance company, and 47 percent permanent partial disability to the body as a whole against the Second Injury Fund. On rehearing the Workmen's Compensation Court found that the plaintiff had failed to prove that he had suffered a substantially greater disability from the combined disabilities than that which would have resulted from the second injury to his thumb considered alone and of itself. The court therefore modified the award by awarding the plaintiff permanent partial disability for the injury to his right thumb against the employer and its insurance carrier and dismissed his petition as to the Second Injury Fund. Plaintiff has appealed.

The relevant statute is Neb. Rev. Stat. § 48-128 (Reissue 1978). The relevant portion of that statute provides: "If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional

permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself; and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated out of a special trust fund created for that purpose, which sum so set aside shall be known as the Second Injury Fund."

The Workmen's Compensation Court, on rehearing, found that the plaintiff had failed to prove that he had suffered a substantially greater disability than that which would have resulted from the last injury considered alone and of itself, because the evidence showed that the plaintiff had returned to work as a cook and was earning as much as, if not more than, he was earning at the time of the injury.

Disability under the Workmen's Compensation Act is defined in terms of employability and earning capacity rather than in terms of loss of bodily functions. *Johnson v. Village of Winnebago*, 197 Neb. 845, 251 N.W.2d 176 (1977).

"Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired. *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980).

While it was entirely proper for the Workmen's Compensation Court to consider the wages the plaintiff received after the injury, the court, on rehearing, disregarded the evidence which established a reduction in the plaintiff's earning power and employability. The evidence established not only many attempts to secure employment without success but also established that at least one employer did not believe the plaintiff was capable of performing the job of cook and that other employees would have to carry part of his employment load. When the plaintiff finally found a job it was on the graveyard shift, the only one he could handle due to his injuries. It is apparent that plaintiff's employability with his combined disabilities is substantially less than it would have been if he had only the injury to his thumb.

The evidence established a substantial reduction in the plaintiff's capacity to perform the tasks of his employment under his combined disabilities compared with his capacity to perform the tasks of his employment if he had suffered only the injury to his thumb. The evidence also established that plaintiff is unable to perform his job without help to compensate for his injuries. It is also obvious that plaintiff's ability to hold a job has been substantially reduced. The fact that plaintiff has made extraordinary efforts to overcome his handicap or that an employer has been generous in employing a handicapped individual ought not to destroy his right to benefits under the Workmen's Compensation Act.

Under previous versions of § 48-128 which limited recovery against the Second Injury Fund to cases of permanent total disability, this court has applied the rule of construction that the Workmen's Compensation Act is to be liberally construed so that its beneficent purposes may not be thwarted by technical refinement of interpretation. Section 48-128 was amended in 1971 to provide for recovery against the Second Injury Fund in cases of partial as well as total disability. In cases prior

to that amendment we held that an employee who has permanent total disability as a result of a combination of injuries sustained in separate accidents is entitled to compensation out of the Second Injury Fund even though the injuries sustained in the separate accidents were schedule injuries which would otherwise be compensated under Neb. Rev. Stat. § 48-121(3) (Reissue 1978). See, *Franzen v. Blakley*, 155 Neb. 621, 52 N.W.2d 833 (1952); *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976). Both cases hold that the purpose of § 48-128 is not to provide compensation for the previous disability but to provide compensation for permanent total disability resulting from a *combination* of the previous fact condition with a compensable injury. In *Camp* we said: "It is the previous fact condition combined with a second compensable injury causing permanent total disability in fact that establishes the right of the employee to compensation from the Second Injury Fund." *Id.* at 465, 238 N.W.2d at 638.

The present language of § 48-128 extends the liability of the Second Injury Fund to permanent partial disability as well as permanent total disability wherever the percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury considered alone and of itself.

In effect, the State contends that the Second Injury Fund should be liable only for the increased disability caused by, but not including, the prior disability. The specific language of the statute and express policy of the Workmen's Compensation Act are contrary to that contention. Although workmen's compensation statutes differ in their precise terms, the rule expressed in the great majority of such statutes is that the Second Injury Fund is liable for the difference between the compensation that would have been payable for the second injury alone and the compensation payable for the combined injuries. See 2 Larson, Workmen's Compensation Law § 59.34(a) (1981). The specific language of § 48-128

clearly fits that statutory pattern.

The parties indicate considerable confusion as to the provision of a portion of § 48-128 requiring the employer to establish, by written records, that the employer had knowledge of the preexisting disability at the time the employee was hired. The language was taken directly from the statutes of another state in which the procedures provided for full recovery by the employee against the employer and then required the employer to take action against the Second Injury Fund to reduce the employer's liability. The section does not fit the Nebraska statutory pattern, but it is unnecessary for us to pass upon the issue here because the evidence is completely undisputed that the employer did have actual knowledge of the preexisting disability at the time the plaintiff was employed. The Workmen's Compensation Court, at the initial hearing, found that the statutory provision for written records did not come into play where the injury and disability is as obvious as the amputation of an arm.

While the findings of fact of the Workmen's Compensation Court on rehearing will not ordinarily be set aside unless clearly wrong, this court may reverse or modify an award of the Workmen's Compensation Court where there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or the findings of fact by the court do not support the order or award. See Neb. Rev. Stat. § 48-185 (Reissue 1978).

The finding of the Workmen's Compensation Court after rehearing that the degree or percentage of disability caused by the combined disabilities was not substantially greater than that which would have resulted from the last injury considered alone and of itself is not supported by the evidence. The initial award of the Workmen's Compensation Court is supported by the evidence and should not have been modified.

In view of the disposition made it is unnecessary to consider the plaintiff's remaining assignments of error.

The decision of the Workmen's Compensation Court on rehearing is reversed and remanded with directions to reinstate the initial award in the Workmen's Compensation Court. Plaintiff is allowed an attorney fee of $1,000 for services of his attorney in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

HASTINGS, J., dissenting.

I respectfully dissent from the majority opinion. There is no authority of which I am aware which permits the translation of a scheduled disability into a disability of the body as a whole where as here the effect of the injury is the usual and natural one expected. *Broderson v. Federal Chemical Co.*, 199 Neb. 278, 258 N.W.2d 137 (1977); *Guerin v. Insurance Co. of North America*, 183 Neb. 30, 157 N.W.2d 779 (1968). Had the two injuries arisen out of the same accident, the plaintiff would have been limited in his recovery to the two scheduled disabilities. Neb. Rev. Stat. § 48-121(3) (Reissue 1978). The character of the injury is not changed by Neb. Rev. Stat. § 48-128 (Reissue 1978).

I am authorized to state that BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. WALTER W. ROLLING, APPELLANT.

307 N.W.2d 123

Filed June 19, 1981. No. 43804.

1. **Convictions: Appeal and Error.** This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt.
2. ____: ____. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed in part, and in part reversed and remanded.

Larry R. Baumann of Kelley, Wallace, Scritsmier, Moore, Romatzke & Byrne, P.C., for appellant.

Paul L. Douglas, Attorney General, and Lynne R. Fritz for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

KRIVOSHA, C.J.

The appellant, Walter Rolling (Rolling), appeals from several convictions and sentences entered by the District Court for York County, Nebraska, following trial to a jury. Rolling was charged in an amended complaint with two counts of theft by unlawful taking or disposition of movable property, one count involving property of the value of more than $100 but less than $300 and the other involving property of the value of $300 or more but not over $1000, in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1979); one count of attempted armed robbery in violation of Neb. Rev. Stat. §§ 28-324(1) and 28-201(1) (b) (Reissue 1979); and one count of use of a weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1979). In addition, the information charged Rolling with being an habitual criminal under the provisions of Neb. Rev. Stat. § 29-2221 (Reissue 1979).

Following the jury verdict finding Rolling guilty on all four substantive counts, the trial court sentenced Rolling as follows: Count I, theft, 161 days' imprisonment in the York County jail, with credit given for time served; count II, theft, 1 year's imprisonment in the Nebraska Penal and Correctional Complex; count III, attempted robbery, 5 years' imprisonment in the Nebraska Penal and Correctional Complex; count IV, use of firearm to commit a felony, not less than 4 nor more

than 7 years' imprisonment in the Nebraska Penal and Correctional Complex; and on count V, the charge of being an habitual criminal, the trial court *specifically* sentenced Rolling to a term in the Nebraska Penal and Correctional Complex of not less than 4 nor more than 7 years. The sentences on counts I, II, and III were to be served concurrently. The sentences on counts IV and V were likewise to be served concurrently to each other but consecutively to counts I, II, and III. Rolling appeals from that judgment and order, claiming that the evidence was insufficient for the jury to find him guilty beyond a reasonable doubt and that the sentences imposed were harsh and a clear abuse of discretion. We affirm in part, and in part reverse and remand with instructions.

Before proceeding to dispose of the assignments of error raised by Rolling, we are compelled to address a plain error not raised by Rolling but one which must be addressed. Rolling was found by the court to be an habitual criminal. Nevertheless, he was sentenced by the trial court on the first four counts to terms of imprisonment of less than 10 years. In addition, he was specifically sentenced to a term of imprisonment as an habitual criminal. The sentencing is in all respects improper and must be corrected. Under the provisions of § 29-2221, one is not sentenced as an habitual criminal. This is due to the fact that the habitual criminal statute is not a separate offense but, rather, provides an enhancement of the penalty with a minimum sentence of 10 years and a maximum sentence of 60 years for each conviction committed by one found to be an habitual criminal even though, absent a conviction as an habitual criminal, the minimum or maximum sentence might be less. See *State v. Journey*, 201 Neb. 607, 271 N.W.2d 320 (1978).

The proper procedure to be followed to correct the situation in the instant case is set out in our earlier decision of *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974), wherein we held that where a defendant found

guilty of a substantive crime as well as being an habitual criminal is improperly sentenced, both sentences must be set aside and this court should remand the action back to the trial court for proper sentencing. We said in *State v. Gaston, supra* at 123, 214 N.W.2d at 377: "On direct appeal this court has the power to remand a cause for a lawful sentence where the one pronounced was void as being beyond the power of the trial court to pronounce and where the accused himself invoked appellate jurisdiction for the correction of errors." The sentences imposed in this case being illegal, our action must be to remand the cause back to the trial court for proper sentencing consistent with the law.

Having thus disposed of the plain error, we shall now direct our attention to the assignments of error listed by Rolling. They are two in number: (1) The evidence was insufficient for the jury to find the defendant guilty beyond all reasonable doubt; and (2) The sentences imposed for all counts were harsh and an abuse of discretion. In view of the fact that the sentences are illegal and sentencing must be done again, we need not concern ourselves with the second assignment. We address only the first assignment to the effect that the evidence was insufficient for the jury to find the defendant guilty beyond all reasonable doubt.

The events involved in the instant appeal concern three separate occurrences, all involving the same Conoco service station located at the York interchange just off of Interstate 80. The first incident, which occurred on March 21, 1980, concerned the taking of a York State Bank moneybag containing coins from the Conoco station. On the day in question, Rolling was at the service station for some period of time. The evidence discloses that Rolling was seen in the area that the moneybag was kept, which was a place where customers were not to be. He was seen leaving this area with a folded magazine in his hand. Upon dropping the magazine, he departed from the station and immediately walked to his car and opened the trunk. At about 4 p.m. that same day, the

testimony disclosed that Rolling appeared at a drive-in window of First Federal Savings & Loan Association of York, Nebraska. He was seen taking money from a York State Bank bag located in the trunk of the car. The moneybag was identical to the type in which the Conoco station's coins were kept.

The second incident occurred on March 29, 1980, when Rolling again appeared at the Conoco station requesting assistance in removing his vehicle from a ditch a little over a mile east of the station. On this particular evening the owner of the station had directed one of his employees to place a briefcase containing the station's receipts for that day in a red wrecker in front of the station. The evidence discloses that Rolling saw the briefcase being placed in the wrecker. An eyewitness testified that later that same night, and after the station had closed, an automobile similar to the car driven by Rolling pulled up next to the wrecker and someone exited from the passenger door and tried to gain entrance to the wrecker. The wrecker was entered and the witness observed a man enter back into the automobile from the passenger side. There was testimony that the only way of gaining entrance into Rolling's car was from the passenger side, the driver side door being inoperable.

The third and fourth counts involved an occasion on April 4, 1980, and were for armed robbery and the use of a weapon at the same Conoco station. The station employee testified that at approximately 8:40 p.m., while closing the Conoco station, he was accosted by a man he identified as Rolling. Rolling demanded the station's money. When the employee refused to give him the money, a scuffle ensued, during which the employee testified that a knife was pulled by Rolling and the employee was cut on the hand. The employee testified that he recognized Rolling as he had seen him on two previous occasions at the service station.

While it is true that the evidence was in conflict, it cannot be said that the jury could not have found Rolling

guilty. We have, on numerous occasions, held: "'This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt.'" *State v. French*, 206 Neb. 92, 98, 291 N.W.2d 248, 251 (1980). See, also, *State v. Meadows*, 203 Neb. 197, 277 N.W.2d 707 (1979).

Moreover, we have repeatedly said: "In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." *State v. Carter*, 205 Neb. 407, 409, 288 N.W.2d 35, 36 (1980). See, also, *State v. Muniz*, 203 Neb. 206, 277 N.W.2d 712 (1979).

The jury resolved the dispute against Rolling and we are not in a position to say it had no basis for reaching the conclusion it did. We therefore find that the evidence was sufficient to permit the jury to find the defendant guilty as charged.

The convictions, therefore, are affirmed and the matter remanded to the trial court for proper sentencing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM M. RESLER, JR., APPELLANT.

306 N.W.2d 918

Filed June 19, 1981. No. 43831.

1. **Criminal Law: Search and Seizure.** Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant.
2. ____: ____ The basic elements of the emergency doctrine exception may be summarized in the following manner: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) The search must not be primarily motivated by intent to arrest and seize evidence; and (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

Appeal from the District Court for Adams County: FRED R. IRONS, Judge. Affirmed.

Whelan, Foote & Scherr, P.C., for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, William M. Resler, Jr. (Resler), appeals from a conviction based upon a jury verdict finding Resler guilty of four counts of burglary and two counts of first degree sexual assault. The trial court sentenced Resler to the Nebraska Penal and Correctional Complex for a term of not less than 6 years nor

more than 10 years on each conviction of burglary, and for a term of not less than 10 years nor more than 15 years for each conviction of first degree sexual assault, each sentence to be served concurrently.

Resler appeals to this court, principally maintaining that the trial court erred in not suppressing certain evidence which Resler maintains was obtained in violation of his rights under the fourth amendment to the Constitution of the United States. It appears to us that the specific issue raised by Resler involving the fourth amendment has not heretofore been decided by this court. On a close reading of the record and an examination of the numerous decisions rendered by other jurisdictions which have addressed this specific fourth amendment issue, we find that the action of the trial court in refusing to suppress the evidence was, in all respects, correct. Furthermore, we find that the other assignments of error raised by Resler must likewise be rejected. The judgment must be affirmed.

The record discloses that beginning in late 1978 and continuing during 1979, Hastings, Nebraska, was afflicted by a series of unsolved burglaries as well as several sexual assaults. All of the burglaries, as well as the sexual assaults, were committed in residences occupied by females and in each instance undergarments belonging to the female occupants were taken. With the exception of a man who was charged and later released in connection with one of the sexual assaults, no one was arrested for any of these crimes until Resler was taken into custody shortly after December 11, 1979. Although the record is unclear as to the basis for the belief, it does appear that during all this time a Sergeant Murphy of the Hastings Police Department suspected that Resler was involved in all these crimes. He had asked that he be called in on any incident involving Resler, regardless of the time of day or night.

Late on the evening of December 10, 1979, the occupants of an apartment unit at 745 South Baltimore Avenue heard noises in the lower level of their apart-

ment and called the police. The apartment was a part of a complex consisting of a series of 16 free-standing rowhouse-type units. Resler lived in one of the units.

Later, in the early morning hours of December 11, and apparently before the police arrived, another tenant, Thomas Waddle, saw a prowler outside his window. Waddle watched the prowler as he went from apartment to apartment in the complex, checking doors. Waddle secured his .22-caliber rifle, went out of doors, and followed the prowler. Waddle observed the prowler enter an apartment, and when the prowler came out of the apartment Waddle ordered him to stop or be shot. The prowler started running and Waddle shot at the prowler. The prowler fell to his knees, though at the time it was uncertain as to whether he fell because he had been shot or because he was attempting to get out of range of the rifle. In any event, in a moment the prowler regained his footing and proceeded running once again. At about the time that Waddle fired his shot, a Hastings police officer arrived at the scene. When the officer heard the shot he joined in the chase. Two other civilians also joined the chase and the four of them pursued the prowler, though they were unable to apprehend him. The prowler eventually eluded the four when he went over a picket fence farther on down the street. Waddle testified that at that point he recognized the prowler as a tenant whom he knew resided in Resler's apartment, although at the moment he did not know him by name. Apparently, he had seen Resler on other occasions coming in and out of his apartment and working on his automobile near the apartment.

Two other police officers conducted a search of the neighborhood from their cruisers. Those officers, the initial responding officer, and the several civilians then reconnoitered in the parking lot outside Resler's apartment to consider what to do. A radio call had been made for Sergeant Murphy pursuant to his earlier request.

At approximately 1:05 a.m. on the morning of December 11, 1979, Sergeant Murphy arrived at the scene. The other officers present briefed Murphy on what had happened, including the fact that Waddle believed that he struck Resler when he fired at him. At this point an investigation of the outside of Resler's apartment was made and it was discovered that the apartment door was open. There were no lights on in Resler's apartment. Though no one had reported any person entering or leaving Resler's apartment, it is clear that during the time of the chase it was possible for someone to have doubled back and gone into Resler's apartment without being seen. At this point in time, Sergeant Murphy determined to enter Resler's apartment, believing that Resler had been shot and was in need of first aid.

Upon entering the apartment the officers did not find Resler present but did observe in plain view a host of items previously reported stolen in the burglaries, as well as several pairs of women's panties later used to link Resler with several unsolved sexual offenses. Nothing was seized during this entry and the officers made no effort to search the apartment except to quickly observe what was in plain sight. Realizing that Resler was not in the apartment, they immediately withdrew and sought to obtain a search warrant for the apartment. The search warrant was obtained based upon what they had observed in clear view. The first search warrant was issued at about 4:10 p.m. on December 11, 1979. It was served, and items were seized from Resler's apartment at approximately 4:30 p.m. the same day. A second search warrant was issued and served on the morning of December 13, 1979. The second search warrant was made necessary because the officers did not list in the first warrant all of the items they wanted to seize from the apartment.

Resler maintains that the search warrant was obtained with information resulting from an illegal entry into his apartment and therefore the evidence obtained

was the "fruit of a poisonous tree" and inadmissible at trial. See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Resler maintains that absent exigent circumstances a law enforcement officer may not enter the residence of a suspect to arrest him or search his home without a warrant or without consent to enter. Resler relies upon *Payton v. New York, Riddick v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), in support of this position.

It is true that both *Payton and Riddick* stand for the proposition that a police officer who has not obtained either an arrest warrant or a search warrant cannot make a nonconsensual and warrantless entry into a suspect's home in the absence of exigent circumstances. The difficulty with Resler's argument is that he fails to recognize the exigent circumstances present in the instant case. While exigent circumstances generally have been defined to exist where the suspect is in a position to flee as when he is in a car, or when the evidence is located in a place or under such conditions that it is likely to be destroyed while a warrant is sought, a further condition has been recognized as an exigent circumstance authorizing a warrantless or nonconsensual entry into a suspect's home. This exception is known as the "emergency doctrine."

The applicability of the "emergency doctrine" as an exigent circumstance was reaffirmed by the U.S. Supreme Court in the recent case of *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), wherein the Court said at 392: "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." The opinion then cites in support of this statement a number of state and federal cases which have specifically articulated the emergency doctrine as it has developed as an exception to the fourth

amendment's warrant requirement.

While no one case seems to have gathered together all the elements of the emergency doctrine, a reading of many of the cases decided in other jurisdictions supports the view taken by one commentator who has defined the doctrine as follows: "Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant. Thus, to qualify as an emergency exception, there must reasonably appear to exist an exigency in the course of which a discovery related to the purpose of the entry is made. The exigent circumstances legitimate the presence, and the relevance of the discovery to the justification for the entry sanctions the seizure." See Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 Buffalo L. Rev. 419, 426-27 (1973).

One of the cases specifically cited by the U.S. Supreme Court in *Mincey* is the case of *Root v. Gauper*, 438 F.2d 361 (8th Cir. 1971). In the *Root* case the Eighth Circuit said: "For purposes of the instant case, the emergency or exigency doctrine may be stated as follows: police officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in dis-

tress and in need of that assistance. In applying this doctrine, two principles must be kept in mind. (1) Since the doctrine is an exception to the ordinary Fourth Amendment requirement of a warrant for entry into a home, the burden of proof is on the state to show that the warrantless entry fell within the exception. [Citations omitted.] (2) An objective standard as to the reasonableness of the officer's belief must be applied.

"'* * * [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. * * * And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968)." *Root v. Gauper, supra* at 364-65.

One of the most often-cited cases involving the "emergency doctrine" is the case of *People v. Mitchell*, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246 (1976), *cert. denied*, 426 U.S. 953, 96 S. Ct. 3178, 49 L. Ed. 2d 1191 (1976). In the course of its opinion, the *Mitchell* court set out some helpful guidelines for the application of the emergency doctrine, saying at 248-49, 347 N.E.2d at 609-10: "[W]e think it necessary to articulate some guidelines for the application of the 'emergency' doctrine. The basic elements of the exception may be summarized in the following manner: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the

area or place to be searched.

"The first requisite is that the police have valid reasons for the belief that an emergency exists, a belief which must be grounded in empirical facts rather than subjective feelings . . . .

"The second requirement is related to the first in that the protection of human life or property in imminent danger must be the motivation for the search rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding. . . .

"Finally, the limited privilege afforded to law enforcement officials by the emergency exception does not give them carte blanche to rummage for evidence if they believe a crime has been committed. There must be a direct relationship between the area to be searched and the emergency."

For other cases supporting the "emergency doctrine" as an exigent circumstance, see, *United States v. Goldenstein*, 456 F.2d 1006 (8th Cir. 1972); *State v. Jones*, 608 P.2d 1220 (Or. App. 1980); *Horack v. Superior Court*, 3 Cal. 3d 720, 478 P.2d 1, 91 Cal. Rptr. 569 (1970); *People v. Smith*, 7 Cal. 3d 282, 496 P.2d 1261, 101 Cal. Rptr. 893 (1972); *State v. Matsen*, 287 Or. 581, 601 P.2d 784 (1979); *State v. Beede*, 119 N.H. 620, 406 A.2d 125 (1979), *cert. denied*, __U.S.__, 100 S. Ct. 1659, 64 L. Ed. 2d 244 (1980), *rehearing denied*, __U.S.__, 100 S. Ct. 2980, 64 L. Ed. 2d 850 (1980); *Shepherd v. State*, 343 So. 2d 1349 (Fla. App. 1977); *State v. Pires*, 55 Wis. 2d 597, 201 N.W.2d 153 (1972); *United States v. Presler*, 610 F.2d 1206 (4th Cir. 1979); *State v. Sanders*, 8 Wash. App. 306, 506 P.2d 892 (1973); *People v. Hill*, 12 Cal. 3d 731, 528 P.2d 1, 117 Cal. Rptr. 393 (1974); *State v. Campbell*, 15 Wash. App. 98, 547 P.2d 295 (1976); *State, etc. v. District Court, etc.*, 591 P.2d 656 (Mont. 1979); *State v. Monroe*, 101 Idaho 251, 611 P.2d 1036 (1980); *Patrick v. State*, 227 A.2d 486 (Del. 1967); *State v. Theodosopoulos*, 119 N.H. 573, 409 A.2d 1134 (1979), *cert. denied*, __U.S.__, 100 S. Ct. 2964, 64 L. Ed. 2d 839

(1980); *People v. Lovitz*, 39 Ill. App. 3d 624, 350 N.E.2d 276 (1976), *cert. denied*, 434 U.S. 842, 98 S. Ct. 141, 54 L. Ed. 2d 107 (1977); *People v. Kepi*, 65 Ill. App. 3d 327, 382 N.E.2d 642 (1978).

We believe the guidelines of the *Mitchell* case, as well as the principles announced in the *Root* case, are fully applicable and present in the instant case sufficient to have justifiably created an exigent circumstance which allowed the officers to enter Resler's apartment without a warrant and without consent.

In the instant case, it is apparent that Murphy and the other officers had justifiable reason to believe that Resler had been shot and wounded and was in need of emergency first aid. Waddle reported that he had fired at Resler and Resler had fallen to the ground. When Murphy and the other officers arrived at Resler's apartment in the early morning of December 11, 1979, they found Resler's door open, without any apparent explanation. They could have reasonably concluded, as they did, that Resler was wounded and had returned to the apartment, perhaps too weak to either close the door or turn on a light. They were therefore justified in believing that an emergency existed in which they had an obligation to enter the apartment, find Resler, and provide him necessary first aid.

It is likewise clear from the evidence that they had no intent to arrest Resler or to make any search of the apartment. This is apparent by their behavior both at the apartment and later that day when they found Resler at his mother's home. The moment they determined that Resler was not present they left the apartment. They made no effort to try to determine whether there was any property located anywhere else not in plain view, and made no effort to seize any property, including the property in plain view. Furthermore, when they found Resler later that morning at his mother's home he was not arrested even though he had been identified as the primary suspect. He was not arrested until sometime after December 11, 1979.

Finally, they had a reasonable basis, approximating probable cause, to associate the emergency with the place to be searched. It was completely reasonable to assume that a person shot as a prowler and therefore unable to seek emergency aid from a doctor or hospital without giving himself up would seek cover in his own apartment located immediately in the area where he was shot and where he was last seen.

All of these factors taken into account make it clear that the officers did not have an intent to arrest or to make an unreasonable search when they entered Resler's apartment and, in fact, had but a single interest: providing Resler with emergency aid, if necessary. That action falls completely within the emergency doctrine exception to the fourth amendment prohibition against warrantless, nonconsensual searches. The trial court was entirely correct in refusing to suppress the evidence seized through the warrants obtained by reason of the officers' entry into Resler's apartment, and there is no error.

Resler has assigned two other alleged errors which can be quickly disposed of, the most serious problem presented having now been addressed. Resler maintains that the trial court erred in not granting a motion for directed verdict on the grounds of insufficient evidence. An examination of the record discloses that there was ample evidence of property and underclothing in Resler's apartment belonging to victims of the burglaries and sexual assaults. In addition, there was other evidence, including samples of Resler's pubic hair, blood, and saliva which connected him with the sexual assaults, as well as evidence from the victims of the assaults who identified Resler as the individual who committed the assaults upon them. To be sure, there was a dispute about those facts, but, nevertheless, there was sufficient evidence upon which the jury could justifiably find Resler guilty. In *State v. Pena*, 208 Neb. 250, 253, 302 N.W.2d 735, 737 (1981), we said: "[T]he verdict of a jury must

be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." We further said in *Pena, supra* at 253, 302 N.W.2d at 737: "[I]n determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury." To the same effect, see *Vanderheiden v. State*, 156 Neb. 735, 57 N.W.2d 761 (1953). Examining the record as a whole, we are unable to say that the jury was not justified in reaching the conclusions it did. That being the case, we are not at liberty to undo the findings of the jury.

The last assignment raised by Resler is to the effect that the sentences imposed are excessive. The crimes in these cases were serious and displayed both a plan to engage in crime and a plan to totally disregard one's responsibility to abide by the mores of the community. The sentences are well within the statutory limits and we have repeatedly held that a sentence imposed within statutory limits will not be disturbed on appeal absent a clear abuse of discretion. See *State v. Kramer*, 203 Neb. 658, 279 N.W.2d 634 (1979). We are unable to find any evidence of an abuse of discretion and are therefore duty-bound to affirm the sentence.

Having found that all of Resler's assignments of error must be overruled, we therefore affirm the judgment and sentence of the trial court in all respects.

AFFIRMED.

OTTO GASPAR, APPELLANT AND APPELLEE, V. STERLING R. FLOTT AND MARY ELLEN FLOTT, APPELLEES AND APPELLANTS, AND MID CITY BANK, INC., A BANKING CORPORATION, APPELLEE.

307 N.W.2d 500

Filed June 26, 1981. No. 43252.

1. **Res Judicata.** The conclusiveness of a prior judgment precluding subsequent litigation of the same cause of action between the same parties is much broader in its application than a determination of the questions actually involved in the prior action.
2. **Causes of Action: Words and Phrases.** A cause of action has been defined as consisting of a primary right possessed by the plaintiff and a corresponding duty devolving upon the defendant, combined with a delict or wrong done by the defendant.
3. **Contracts.** As a general rule, the covenants of a contract will be considered and held as dependent conditions to be performed by the respective parties unless it is clear that the parties intended them to be independent.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed in part, affirmed in part as modified, and in part reversed and remanded.

Michael A. Nelsen of Schmid, Ford, Mooney & Frederick for appellant Gaspar.

Robert F. Peterson of Lydick & Peterson for appellants Flott.

Dirk W. DeRoos and J. Thomas Marten of Kutak Rock & Huie for appellee Mid City.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and COADY, District Judge.

COADY, District Judge.

The parties will be disappointed in the brevity of this opinion, but a full statement of the facts would not be helpful. The printed evidence examined snugly fills a box 10 inches by 18 inches by 12 inches. Three documents which have been reviewed as one contract consist

of twenty-two legal size pages. The full bill of exceptions in a prior 9-day jury trial is also a part of this record.

Otto Gaspar, as agent for the Graf family residing in Munich, Germany, hereinafter referred to as Gaspar, purchased two residential apartment-townhouse complexes from Sterling R. Flott and Mary Ellen Flott, hereinafter referred to as Flott. A contract, or contracts, was made up and executed as of April 5, 1974. Eleven pages of the writings were labeled "Offer to Purchase" and the next ten pages were labeled "Management Agreement." The offer to purchase contained the usual details set forth in a purchase contract, consisting of description, consideration, buyer and seller warranties, and written representations. Somewhat unusual were promises by Flott that the minimum monthly gross income would be $95,493 and that the 1975 general real estate taxes would not increase above a stated amount. If the gross was not obtained or the real estate tax ceiling violated, the purchase price was to be reduced by a certain formula. To ensure those promises, Flott promised to provide Gaspar with a letter of credit drawn upon a bank. The document also provided that it was understood that the parties would enter into a management agreement for at least 1 year.

The management agreement referred to the offer to purchase and provided that Flott be paid $60,000 a year to manage the complexes. The balance of the writing contains instructions and procedures for management, as well as a definition of Flott's powers, duties, and responsibilities as manager.

On July 15, 1974, the second defendant herein, Mid City Bank, Inc., hereinafter referred to as Bank, issued Gaspar a letter of credit to guarantee the terms of both the offer to purchase and the management agreement, up to a limit of $150,000. Because no issue has been made and it appears absolutely clear that the Bank, as a guarantor or surety, merely stands in the $150,000 shoes of Flott, no authority will be presented on the point. The Bank has the same rights as Flott, no more

and no less.

Sometime thereafter, Gaspar filed suit against the Bank and Flott, seeking a reduction of the purchase price on the apartment complexes as a result of Flott's failure to meet the rental guarantee set out in the offer to purchase. That was the only breach sued upon, and on September 22, 1977, a jury gave Gaspar a verdict which canceled certain mortgages and awarded judgment against the Bank in the sum of $50,000. No appeal was filed by any party.

After the jury verdict, Gaspar again sued the Bank and Flott upon five additional alleged violations of the offer to purchase and three alleged violations of the management agreement. Both defendants filed answers and the issues were made up. The Bank filed a motion for summary judgment, a hearing was had thereon, and Judge Tesar entered an order which dismissed Gaspar's suit against the Bank. Gaspar appeals that order. We affirm in part and reverse part of that decision.

Flott also filed a motion requesting summary judgment against Gaspar. Gaspar retaliated with a motion for partial summary judgment against Flott. The two motions were heard together, and Judge Grant entered a judgment for Gaspar and against Flott in the sum of $134,605.47. Flott appeals. We affirm with modifications.

Flott and the Bank argue to this court that by reason of the rule of res judicata, Gaspar was barred from prosecuting any further action on the writings making up the parties' contract once the jury verdict was final. Gaspar claims that a contract doctrine of divisible agreements prevents operation of the rule.

To a party wanting a matter decided by the doctrine of res judicata, it seems natural to quote the black letter law repeated in so many cases, such as *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 181 N.W.2d 119 (1970), wherein it is said: "The rule of res judicata is grounded, first, on a public policy and the necessity to terminate litigation and, second, the hardship on a person by being vexed more than once for the same

cause. The conclusiveness of a prior judgment precluding subsequent litigation of the *same cause of action* between the same parties is much broader in its application than a determination of the questions actually involved in the prior action; the conclusiveness of the judgment *in such case* extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in the final judgment, whether formally raised or not." The words "same cause of action" and "in such case" were italicized by this writer to draw attention to the limited meaning of the black letter law above set forth.

A cause of action has been defined as consisting of a primary right possessed by the plaintiff and a corresponding duty devolving upon the defendant, combined with a delict or wrong done by the defendant. *City of Alliance v. Cover-Jones Motor Co.*, 154 Neb. 900, 50 N.W.2d 349 (1951). This court, by its ruling on fact situations in several cases, has established that the conclusiveness of a prior judgment, including matters which might have been raised under the doctrine of res judicata, does not apply where a second or latter action is a separate and distinct cause of action. See, *Gayer v. Parker & Son*, 24 Neb. 643, 39 N.W. 845 (1888); *Peters v. Meyer*, 131 Neb. 847, 270 N.W. 312 (1936); *American Province Real Estate Corp. v. Metropolitan Utilities Dist.*, 178 Neb. 348, 133 N.W.2d 466 (1965); *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 230 N.W.2d 99 (1975); *Suhr v. City of Scribner*, 207 Neb. 24, 295 N.W.2d 302 (1980). Absent an order for consolidation, there is nothing in the law that requires a party to join in one suit several distinct causes of action. *Suhr v. City of Scribner, supra.* If the reader can keep the above rules in mind, then the numerous cases concerning res judicata, issue preclusion, and collateral estoppel will form a comprehensible pattern of fact situations.

As to actions on contracts, the cases of *Hamilton v.*

Thrall, 7 Neb. 210 (1878), *Haurigan v. Chicago & N.W.R. Co.*, 80 Neb. 132, 113 N.W. 983 (1907), and *Farmers Union Cooperative Elevator Federation v. Carter*, 152 Neb. 266, 40 N.W.2d 870 (1950), stand for the proposition that, as a general rule, the covenants of a contract will be considered and held as dependent conditions to be performed by the respective parties unless it is clear that the parties intended them to be independent. Those three cases decided that the contracts therein were not severable, but the case of *Wilcox v. Badger Motor Car Co.*, 99 Neb. 189, 155 N.W. 891 (1915), produced a divisible contract.

At least three other decisions found contract actions to be divisible. In two, *Burwell & Ord Irrigation & Power Co. v. Wilson*, 57 Neb. 396, 398, 77 N.W. 762, 763 (1899), and *Barnes v. Barker*, 113 Neb. 113, 118, 202 N.W. 430, 432 (1925), it was said: "Generally speaking, the test is that where there are several undertakings, each supported by a distinct consideration, the contract is severable." *Reichert v. Mulder*, 121 Neb. 11, 235 N.W. 680 (1931), indicated that whether a contract is entire or several is a question of intentions apparent in the instrument. In an unambiguous contract, it is to be determined from the language, the subject matter, and the construction placed upon it by the parties in light of the surrounding circumstances. The case probably utters the last word when the opinion forthrightly states, "A contract which in its nature and purpose is susceptible of division and apportionment is divisible and severable." *Id.* at 14, 235 N.W. at 682.

Both in his written and oral argument, Gaspar insists that each covenant in a contract can be separately sued upon. We find no authority for or reason in that argument. We are convinced, upon inspection of the evidence herein, that the parties intended two separate contracts or one divisible contract. The offer to purchase and the management agreement provide the basis for two separate and distinct causes of action.

Our decision then requires us to inspect and comment

on Gaspar's amended petition. What he calls the first, second, fourth, seventh, and eighth causes of action, we simply declare to be elements of the breach of his cause of action on the offer to purchase. Therefore, the doctrine of res judicata prevents him from suing on those elements, and Judge Tesar is affirmed in his ruling to that extent. Elements three, five, and six of said amended petition are elements of an alleged breach of the management agreement, and Judge Tesar's ruling is reversed to that extent and the alleged breach remanded to the District Court for trial.

We next consider Judge Grant's ruling which awarded partial summary judgment for Gaspar and against Flott. Gaspar argues that this ruling should be affirmed because the trial court awarded judgment on the basis that Flott failed to timely respond to a request for admissions previously filed by Gaspar. While that presentation is correct, a search of the pleadings shows that it is no answer to a valid defense of res judicata.

Gaspar filed his amended petition on August 3, 1978, and Flott filed an answer thereto on August 22, 1978, wherein the defense of the prior jury action was pleaded. As to the promises contained in the offer to purchase, the conclusiveness of the prior judgment was well and flexing its muscles when Gaspar made his request of Flott for admissions on April 25, 1979. The trial judge had to consider the defense and deny all claims springing from the offer to purchase.

Because this case has more technical problems than any good lawyer could dream up, we have yet to look at the specifics of Judge Grant's order for partial summary judgment. Part of the judgment, $40,159.54 to be exact, was awarded on the claim that Flott used certain rental payments he collected as manager to pay his personal expenses instead of delivering them to Gaspar. We have already decided that there is no bar to a suit on the management agreement and must decide whether this part of the partial summary judgment is valid.

The transcript has made this part of our decision

easy. The request for admissions asked Flott to admit two propositions, which we quote: "12. That subsequent to the sale of the aforesaid apartment complexes by the defendants Flott to the plaintiff, the defendants Flott caused rental income received subsequent to such sale to be used to pay for expenditures incurred by the defendants Flott prior to the sale of the aforesaid apartment complexes to the plaintiff. 13. That the amount of the rental income referred to in Request for Admission No. 12 above was $40,159.54." Flott's failure to deny or admit such request would ordinarily sustain summary judgment because there is no real controverted fact in evidence. But the Flotts did ask leave to file a response out of time, which was refused. On pages 93 and 94 of the transcript are the proffered answers as follows: 12. "Admit" and 13. "Deny. Expenditures were made in the amount of $37,523.88." We find that Judge Grant's ruling on Gaspar's motion for partial summary judgment should be affirmed with the amount of judgment modified to award $37,523.88.

At the time that these matters are once again taken up in the District Court, we suppose that someone will wonder if the Bank is now barred by the rule of res judicata from litigating the $37,523.88 partial judgment we have just approved to Gaspar against Flott. The question is not before us at this time, but it is suggested that the parties carefully read our opinion and observe our holding on the facts in *Midwest Franchise Corp. v. Wakin*, 201 Neb. 450, 268 N.W.2d 737 (1978).

Finally, we must discuss the request of the Bank to charge Gaspar for the costs of preparing the jury trial bill of exceptions and transcript and the supplemental transcript. We deny this request. It must be pointed out that the jury did not consider the same issues as were considered in the motions for summary judgment. We believe this request was made because the subtle distinctions between different ideas — res judicata, issue preclusion, and collateral estoppel — have not been

recognized by the parties. We might also point out that the transcripts need not contain the briefs of the parties to the trial court and that all unnecessary inclusions make our review difficult.

AFFIRMED IN PART, AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED AND REMANDED.

CLINTON, J., concurs in result.

IN RE GUARDIANSHIP OF BEN L. BREMER, A PROTECTED PERSON. BERYL CARY, APPELLANT AND CROSS-APPELLEE, V. WILLIAM B. WEIR, GUARDIAN, APPELLEE AND CROSS-APPELLANT.

307 N.W.2d 504

Filed June 26, 1981. No. 43368.

1. **Guardians and Conservators: Judgments.** An order of a county court approving a final settlement of the accounts of a guardian or conservator, made or entered at a formal hearing of which all interested parties had notice, is a judgment which becomes res judicata and can only be vacated on such proof of fraud as would justify the setting aside of any other judgment.
2. **Guardians and Conservators: Pleadings.** If the object of a petition is to set aside an order approving a final account between a guardian or a conservator and his ward for fraud, it must allege some distinct and specific act of fraud from which the petitioner suffered injury. It is also necessary that such petitioner negative all fault or negligence on his part.
3. **Estates: Fees.** If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate.
4. **Estates: Attorney Fees: Costs.** Either the county court or the District Court on appeal ordinarily has discretionary power and authority to order payment of costs and, in proper cases, to order payment of reasonable fees to attorneys for services rendered to a good faith trustee out of the trust estate in litigation.

Appeal from the District Court for Chase County: JACK H. HENDRIX, Judge. Affirmed in part, and in part reversed and remanded with directions.

Murphy, Pederson, Piccolo & Anderson for appellant.

Terry E. Savage for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The appellant filed objections to the final account and petition for final settlement of the guardian of Ben L. Bremer, a protected person, and prayed that the guardian be surcharged for alleged breaches of fiduciary duties. The county court, after hearing, entered its order finding that there was no breach of fiduciary duty by the guardian and approved the final accounting and inventory and discharged the guardian from his trust. Attorney fees for representation of the guardian were denied. Appeal was taken to the District Court. The District Court affirmed the orders of the county court in all respects and this appeal followed.

On April 21, 1970, Ben L. Bremer filed a petition in the county court alleging that by reason of infirmities of age and physical disability he was unable to manage his estate and requested the appointment of William B. Weir as his conservator. The county court appointed Weir as conservator on the same day. Ben L. Bremer had four children, two sons, Duane and Byron, and two daughters, Duanne Deane Dixon and Beryl Cary, who were his only heirs. Beryl Cary is the appellant in this case.

Shortly after his appointment the conservator embarked on a project to convert three quarter sections of the Bremer farmland to irrigation. The county court, the ward, and the members of his family knew of the plan.

Two farm leases were made by the conservator, one with Edwin L. Fuehrer as lessee of two quarter

sections, and one with Byron Bremer which included one quarter section similar in nature to the Fuehrer quarters. The conservator filed a request for authorization to make such leases, and on January 15, 1971, the county court entered its order ex parte authorizing the conservator to make such leases. The Fuehrer lease was for 5 years beginning with the 1971 crop year and was for a cash rent of $1,500 per quarter section per year. The land had previously been leased on a crop share basis and Ben L. Bremer had been receiving approximately one-half of that amount per year. The term of the Byron Bremer lease and the cash rent per quarter section were identical to those of the Fuehrer lease. The appellant has raised no objections to the Byron Bremer lease and it is not in issue here.

At the time the leases were executed the conservator also negotiated a 5-year equipment lease for two center pivot irrigation systems between 3 Circle Irrigation, Inc., lessor, an irrigation company in which the conservator had an interest, and Fuehrer, as lessee. The evidence is that the court and the Bremer heirs were informed of the sprinkler leases. Fuehrer testified that he was not required to lease or purchase the sprinkler systems from anyone and that the equipment lease was in no way tied to the lease of the land. Fuehrer was unrelated to the Bremer family or to the conservator and was selected because of his farming ability.

A year or two after the Fuehrer equipment leases were executed the conservator and his brother terminated their interests in 3 Circle Irrigation, Inc., and became the owners of the Fuehrer equipment and thereafter earned a profit from the equipment lease.

In 1971 the conservator applied for and obtained court authorization to drill two irrigation wells on the land leased to Fuehrer and to install a well and pump at a total expense of approximately $18,000. In the spring of 1972 the conservator paid $1,100 to

level a portion of the land covered by the Fuehrer lease. In 1974 the conservator installed two stock wells at a cost of approximately $3,000, but the yearly Fuehrer rent was increased to amortize the cost of the stock wells.

The evidence is apparently undisputed that the ward, the heirs, and the court knew the terms of the 1971 lease and the facts of the irrigation expenditures during the period of that lease.

In 1975, several months before the 1971 leases were to expire, the conservator advised some of the Bremer family members that he anticipated renewing the leases to the same tenants. Duane Bremer then submitted a written bid to the county court offering to lease the two Fuehrer quarters for the sum of $4,000 per quarter per year. On May 29, 1975, the conservator wrote to all four of the Bremer heirs advising them that he intended to more than double the rentals payable under the Fuehrer and Byron Bremer leases, and specifically advising them that he expected to lease the two Fuehrer quarters to Fuehrer for the sum of $8,000 per year for an additional term of 5 years.

On June 3, 1975, the conservator executed a new lease for the two Fuehrer quarters for a term of 5 years beginning January 1, 1976, for a cash rental of $8,000 per year. That lease was also filed with the court, although the conservator did not request court approval. The conservator also renewed the Byron Bremer lease for 5 years. That portion of the lease which included the one quarter section similar in nature to the Fuehrer quarters was renewed at a cash rental of $4,000 per year.

At the time the conservator executed the 1975 Fuehrer lease he and his brother again leased the two pivot systems to Fuehrer for a term of 5 years at a slightly higher rental price.

On January 5, 1977, the conservator filed his petition and final account praying for approval of his acts and doings and his discharge as conservator. The petition

recited that the ward's infirmities had progressed and that a guardianship for a protected person was required, and prayed for the appointment of William B. Weir as the guardian. Ben L. Bremer and all the heirs were given due notice of the filing of the petition and of the date of hearing on the petition. On January 31, 1977, following hearing, the county court approved and allowed the final account of the conservator, allowed a final fee to the conservator, and ordered his discharge. The county court also appointed William B. Weir guardian of the person and estate of Ben L. Bremer and set his bond as guardian.

On July 12, 1977, Ben L. Bremer died. On February 9, 1978, William B. Weir filed his petition for final settlement and discharge as guardian. The appellant, Beryl Cary, filed objections to discharge and prayed that the guardian be surcharged for alleged breaches of fiduciary duty based upon the conservator's actions in connection with the two Fuehrer leases of 1970 and 1975. Testimony at trial was basically directed to the reasonable rental value of the land leased to Fuehrer at the respective times of the two leases. The appellant's expert witness, who had not previously appraised farm leases and who conceded that he sought opinions from unnamed persons in the area and found no comparable leases on file, testified that in his opinion the fair market rental for the 1970 lease would have been $10,600 per year, and that the fair market rental at the time of the 1975 lease would have been approximately $16,000 per year. The evidence for the guardian was that the rents were reasonable and were based upon the market price of leases of similar land in the area at the time.

The county court, in an oral opinion, found that the 1970 lease rental was unreasonably low but did not involve any breach of fiduciary duty. The court also found that the 1975 lease rental was reasonable, and also found that due to the actions of the conservator and guardian the entire assets of the estate had been very substantially increased.

On May 15, 1978, the court entered its written order finding that there was no breach of fiduciary duty by William B. Weir during the period of time he acted as conservator or guardian of the estate, approved the final accounting and inventory of the guardian, and discharged him from his trust. At a subsequent hearing the county court denied the guardian's request for allowance of an attorney fee for the defense of the objections.

On appeal the District Court found that the evidence did not show that the land was leased to Fuehrer as an inducement for the lease of the sprinkler systems and that the lease considerations for the land in the leases of 1970 and 1975 were fair, reasonable, and within the limits of the market. The District Court affirmed and approved all orders of the county court and this appeal followed.

The appellant's position is that the rentals fixed in the Fuehrer leases of 1970 and 1975 in the conservatorship were unreasonably low, and that the guardian may now be surcharged for his acts as a conservator because he accepted the leases as guardian which he had executed as conservator.

There can be no dispute but that all the affirmative actions of William B. Weir which are complained of by the appellant were done in his capacity as conservator. It is also clear that the court, the ward, and all of his heirs had actual notice of the existence and terms of both leases, and also had legal notice of the final accounting and petition for discharge of the conservator and of the appointment of the guardian.

The general rule in most jurisdictions is that a final settlement of the accounts of a guardian, executor, administrator, conservator, or other trustee judicially determined at a formal hearing of which all interested parties have notice is considered to be a judgment which becomes res judicata. See, 39 Am. Jur. 2d *Guardian and Ward* § 173 (1968); 39 C.J.S. *Guardian & Ward* § 165a (1976). Nebraska follows that rule.

An order of a county court approving a final settlement between a guardian and his ward can only be vacated on such proof of fraud as would justify the setting aside of any other judgment. *In re Guardianship of Protsman*, 136 Neb. 192, 285 N.W. 494 (1939). If the object of a petition is to set aside an order approving a final account between a guardian and his ward for fraud, it must allege some distinct and specific act of fraud from which petitioner suffered injury. It is also necessary that such petitioner negative all fault or negligence on his part. *Id.* at 195, 285 N.W. at 496. See, also, *In re Estate of Josephson*, 138 Neb. 193, 292 N.W. 595 (1940). There is no evidence of fraud in this record.

Appellant relies on *In re Guardianship of Phillips*, 144 Neb. 183, 13 N.W.2d 99 (1944). That case is clearly distinguishable. It is distinguishable on its facts because it involved an unauthorized investment made without statutorily required court approval, and the successor guardian accepted the assets with knowledge and without any accounting from the prior fiduciary. Even more importantly, the case is distinguishable because the ward was a minor and was incapable of challenging any accounting of the former guardian, even if one had been made. Under such circumstances, no issue of res judicata could have been involved.

Aside from the principles of res judicata, the evidence in the record in the present case supports the findings of both the county court and the District Court that there was no breach of fiduciary duties on the part of William B. Weir, either as conservator or as guardian. The judgment of the District Court approving the final account of the guardian and discharging him from his trust is fully supported by the evidence.

On cross-appeal the guardian contends that reasonable attorney fees should have been allowed from the guardianship assets for the services of the guardian's attorney in conducting the defense against the appellant's objections to his final account. The county

court disallowed any attorney fee on the basis that the defense was personal to the guardian and not for the benefit of the estate. The District Court also found that the guardian was defending in a personal capacity and that no statute or custom provides for attorney fees in such cases.

In the present case the guardian was not only acting as guardian of the person of Ben L. Bremer but was also acting as guardian of the estate of a protected person. In essence, he was acting not only as guardian of the person but, under appropriate protective order, as a special conservator under the provisions of Neb. Rev. Stat. § 30-2630 (Reissue 1979).

Neb. Rev. Stat. § 30-2643 (Reissue 1979) provides: "If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate." Even in the absence of such a specific statute, the county court has authority to allow reasonable fees to a fiduciary acting under the court's authorization and control for services reasonably required to be performed in connection with his fiduciary duties. While the allowance of an attorney fee to the guardian rests in the sound discretion of the court, the general rule is that a guardian or other fiduciary may be allowed attorney fees necessarily incurred in preparing his final account and in defending it against objections, and for any legal expenses necessarily incurred in asserting or defending the ward's rights. See, 39 C.J.S. *Guardian & Ward* § 164b (1976); 39 Am. Jur. 2d *Guardian and Ward* § 180 (1968).

In general, if the final order in the litigation involved finds the fiduciary guilty of a breach of duty or orders him to account to the estate, the estate is not liable for his attorney fees. If the fiduciary's defense of his acts is fully successful, he is ordinarily entitled to recover the reasonable costs necessarily incurred. In *Scully v. Scully*, 162 Neb. 368, 76 N.W.2d 239 (1956),

this court held that either the county court or the District Court on appeal ordinarily has discretionary power and authority to order payment of costs and, in proper cases, to order payment of reasonable fees to attorneys for services rendered a good faith trustee out of the trust estate in litigation. See, also, *Linn v. Linn*, 146 Neb. 666, 21 N.W.2d 283 (1946). To make a fiduciary personally responsible for all attorney fees reasonably incurred in the successful defense of his actions as fiduciary would impose an unconscionable burden on fiduciary service without justification.

The record in the present case shows that the county court denied "any further fee" to the guardian and for his attorney for services in connection with the objections to the final account. The record does not indicate what fees had previously been allowed, nor is there sufficient evidence of the nature and extent of the services involved upon which to base the determination of a reasonable fee in the county court.

The judgment denying the allowance of any fee to the guardian's attorney for services in connection with the appellant's objections was in error and, upon remand to the District Court, the District Court shall determine and allow a reasonable fee for the services of the guardian's attorney in the District Court; and upon further remand to the county court, the county court shall determine and allow a reasonable attorney fee for services in that court. The guardian's attorney is allowed a fee of $750 for services in this court. All attorney fees are payable from the assets of the guardianship estate. Costs are assessed to the appellant.

That part of the judgment of the District Court approving the final accounting of the guardian and discharging him from his trust is affirmed. That part of the judgment denying the allowance of attorney fees is reversed and the cause is remanded with directions.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

SOKOL CAMP ASSOCIATION OF OMAHA, NEBRASKA, APPELLEE, V. JAMES J. VELEHRADSKY, SR., APPELLANT.

307 N.W.2d 510

Filed June 26, 1981. No. 43469.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded with directions.

Daniel W. Ryberg for appellant.

John P. Miller of Miller & Rowen, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

The plaintiff, Sokol Camp Association of Omaha, Nebraska, originally commenced this action in the municipal court of the city of Omaha to collect a $500 initiation fee and $250 in annual dues arising out of the membership of the defendant, James J. Velehradsky, Sr., in the association. From a judgment entered against the defendant in the sum of $725 in the municipal court, an appeal was taken to the District Court for Douglas County. The District Court modified the judgment to $500, apparently eliminating the claim for $225 in annual dues. This action of the District Court is difficult to understand because the defendant admitted on cross-examination that he had "no quarrel" with the fact that he owed that amount. However, only the defendant has appealed from the $500 judgment; and because the plaintiff has not seen fit to cross-appeal, we can ignore the claim for annual dues.

The defendant assigns as error the finding of both the municipal court and the District Court that the initiation fee was validly assessed and that defendant came within the definition of a "new individual member." We reverse and dismiss.

The association was organized in 1936 for the purpose

of social and cultural enhancement of Czechoslovakian ideals. The association owns certain land near Valley, Nebraska, which it sells in parcels to persons who become members and stockholders in the association, and which entitles them to have a right of access to the clubhouse and certain common grounds. The defendant has been a member of the association since approximately 1955, and served as one of its board members for two terms. He owned one unimproved lot, and in 1977 entered into a land contract to purchase an improved lot.

On June 2, 1973, the association passed a resolution, which for the first time in its history provided for an initiation fee. The fee was initially set at $300 and was later raised to $500. The minutes of the meeting at which the fee was adopted stated: "Sramek read Art. II of the By-Laws and Art. VIII, Section B of the Articles of Incorporation. After discussion, Frank Kroupa moved and Claude Jelen seconded the motion, 'That an initiation fee be assessed for new individual members in the amount of $300.00. That such initiation fee be waived for transfers of property within the immediate family. The definition of immediate family for this purpose shall be father, mother, son, daughter, brother, or sister.' Motion passed uanaimously [sic]. A letter informing all members will be sent at a later date."

The association attempted to assess the initiation fee of $500 against the defendant based on the purchase made in 1977. The defendant refused to pay the fee, contending that the resolution passed by the board was not effective to assess an initiation fee; rather, the board was required to amend the bylaws to accomplish this result. He further contends that if the resolution was effective, he did not come within the definition of "new individual member" and therefore should not have been assessed the fee.

The articles of incorporation state in article VIII (b): "The Board of Directors shall make proper grant of privileges of the Association under satisfactory and reason-

able regulations to members of any class provided by the Board, such members to pay annual dues to be fixed by the Board of Directors, and the Board may prescribe in addition to annual dues, an initiation fee."

The bylaws state in article II, § 2: "Initiation fees shall be not to exceed $__ for Individual Members, of not to exceed $__ for Associate Members, and of not to excees [sic] $__ for Organization Members; Provided, the Board of Directors, in its discretion, may waive the same." None of the blanks were filled in.

It is clear that the articles of incorporation give the board the authority to assess an initiation fee. Because the bylaws show no amount in the blank left for a limitation on the maximum amount to be assessed does not in any way place a limitation on the authority already granted by the articles. The resolution setting the amount to be assessed at the board meeting was within the board's authority. An amendment to the bylaws was unnecessary. The appellant's first assignment of error is without merit.

The second assignment of error concerns the effect of the resolution. The articles define "individual member" as "being a stockholder, duly elected, who shall purchase and hold a lot within the grounds of this Association . . . ." The resolution assesses an initiation fee for "new individual members." Both parties concede that the defendant was a member of the association prior to the purchase of the 1977 lot. Both corporate bylaws and the articles of incorporation are to be construed reasonably and according to the common and approved usage of the language employed. 18 Am. Jur. 2d *Corporations* §§ 83, 168. It is clear that the defendant had been an "individual member" for years prior to the effective date of the 1973 resolution. It is not so clear how he could later become a "new individual member" within the common meaning of that phrase. We are of the opinion that the defendant was already an individual member of the association, and by merely purchasing another parcel of land he did not suddenly become a new member. This is

particularly true since the reason for assessing an initiation fee is as expressed by Claude L. Jelen, a board member: "[W]e felt that people coming in now would have the benefit of a lot of work that had been done at Camp, the benefit of, of the buil--, use of the building and the use of the grounds. And, so, we felt that any, anyone coming in now, should pay something toward, toward those increased benefits that were available to them."

The defendant is not a "new individual member" within the common meaning of the words, and should not have been assessed the initiation fee. The judgment is reversed and the cause is remanded to the District Court with directions to vacate the judgment of the municipal court and to dismiss plaintiff's action.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CURTIS J. BRANCH, APPELLANT.

307 N.W.2d 512

Filed June 26, 1981. No. 43568.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The defendant was charged with murder in the first degree and found guilty by a jury of murder in the second degree. He was sentenced to a term of life im-

prisonment. On appeal to this court he makes and argues two assignments of error: (1) The sentence is excessive; and (2) The court erred in permitting the introduction into evidence of three photographs of the body of the deceased. The facts surrounding the crime are the following. The defendant, at the time of the crime, was 24 years of age. He and the victim had been living together, along with the victim's 7-year-old son, for a period of about 3 years following the defendant's honorable discharge from the military service. The record indicates that there had been a series of quarrels between the defendant and the victim and that he had on occasion used violence upon her.

On the day of the crime they had quarreled. When he returned to the home later in the evening the quarrel continued. The defendant testified in his own behalf and said that the killing was an accident which occurred when, during the quarrel, he shoved her against the wall and she struck her head. The testimony of the pathologist was that the death was caused by a manual strangulation which would have required substantial force applied over a period of 5 to 10 minutes. The hyoid bone of the throat was fractured.

The defendant's only criminal record consists of an absence without leave from the Army for a period of 1½ months. He apparently returned to the Army voluntarily. He has a rather long string of traffic offenses. He has not been convicted of a felony or other crime. He is a high school graduate and, at the time of his arrest, was employed by the division of parks of the city of Omaha.

The sentence imposed is the maximum provided by law for the offense of which he was convicted, but we cannot, because of the gravity of the crime, say that the sentence is excessive.

The defendant argues that the tendency of the photographs to which he objects to excite the passion and prejudice of the jury exceeded their probative value, were cumulative, and, therefore, their admission constituted prejudicial error which requires a new trial. One of the

photographs was taken in the garage where the defendant had deposited the body after the killing and shows the body in the condition in which it was found. It indicates bleeding from the mouth. The other two photographs were taken on the slab in the morgue before the autopsy. One of these photographs shows the same bleeding from the mouth as the one taken in the garage. The other photograph shows bruises about the throat. Both of the latter photographs are corroborative of the testimony of the pathologist as well as is the one of the body where it was discovered.

The admission of the photographs was not erroneous. See, *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Freeman*, 201 Neb. 382, 267 N.W.2d 544 (1978); *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977); *State v. Dittrich*, 191 Neb. 475, 215 N.W.2d 637 (1974).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
EARL L. FRANKLIN, APPELLANT.

307 N.W.2d 513

Filed June 26, 1981. No. 43652.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

KRIVOSHA, C.J.

The appellant, Earl L. Franklin, appeals from a judgment based upon a conviction of guilt returned by a jury after trial. Franklin was convicted of the crimes of robbery and use of a firearm in the commission of a felony. He was sentenced to a term of 4 to 6 years on the robbery charge and 2 to 4 years on the use of a firearm charge, to be served consecutively to the robbery sentence. Franklin raises but a single issue in this appeal. He maintains that a conviction for a crime which is based solely upon uncorroborated eyewitness identification is insufficient. The disposition of this case is governed by our opinion in *State v. Ammons*, 208 Neb. 812, 813-14, 305 N.W.2d 812, 814 (1981), wherein we reaffirmed our earlier position and said: "It has long been the rule in this state that except in certain crimes such as sexual assault, a conviction may rest upon the testimony of a single eyewitness." Our holding in *Ammons* is dispositive of this appeal. The judgment is affirmed.

AFFIRMED.

CONNIE L. OSTEEN, WIDOW OF ALBERT S. OSTEEN, ET AL., APPELLEES, V.
A. C. AND S., INC., ET AL., APPELLEES,
PETER KIEWIT SONS' COMPANY, APPELLANT.

307 N.W.2d 514

Filed June 26, 1981. No. 43692.

1. **Workmen's Compensation: Limitations of Actions.** Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee became disabled and entitled to compensation; and the date of injury, within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred and the period of limitations runs from that date.
2. **Workmen's Compensation: Liability.** Where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the employer who most

recently exposed the worker to the harmful substance is liable to pay the entire award.

3. **Workmen's Compensation.** The policy of liberal construction of the Workmen's Compensation Act for the benefit of the claimant is the rule in Nebraska.
4. **Workmen's Compensation: Liability.** Where the employment at the time of disability was not of a kind contributing to the disease, the employer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation.
5. ____: ____. An injurious exposure must be of the type which could cause the disease, given prolonged exposure, and once the requirement of some contributing exposure has been met, courts will not go on to weigh the relative amount or duration of the exposure under various employers.
6. **Workmen's Compensation: Appeal and Error.** In a workmen's compensation case, the findings by the Workmen's Compensation Court have the force and effect of a jury verdict and will not be set aside unless clearly wrong.
7. **Workmen's Compensation: Evidence.** In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it.
8. **Workmen's Compensation.** All calculations to be made under the provisions of Neb. Rev. Stat. § 48-121 (Reissue 1978), and amendments thereof, have reference to wages, percentages, and results as of the time of injury.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Holtorf, Kovarik, Nuttleman & Ellison, P.C., and James M. Mathis and M. J. Javoronok for appellant.

Michael Kelley of Kelley & Kelley for appellee Osteen.

Neil W. Schilke, P.C., of Sidner, Svoboda, Schilke, Wiseman & Thomsen for appellee Vaughn Insulation.

Michael P. Cavel of Sodoro, Johnson, Daly, Stave, Cavel & Coffee for appellee Taylor Insulation.

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee Johns-Manville.

Barlow, Johnson, DeMars & Flodman for appellee

Inseco, Inc., Central Insulation & Engineering Co., and Thermal Products, Inc.

Norman H. Wright of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., and Theodore J. Stouffer of Cassem, Tierney, Adams, Gotch & Douglas for appellee Owens-Corning Fiberglas Corp.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

Appellant, Peter Kiewit Sons' Company, appeals from an award on rehearing by the Nebraska Workmen's Compensation Court awarding compensation based on Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1978) to appellee, Connie L. Osteen, surviving spouse of Albert S. Osteen. Mr. Osteen died on March 18, 1977, of peritoneal mesothelioma, a rare form of abdominal cancer caused by exposure to asbestos particles. Mr. Osteen was a member of Insulators and Asbestos Workers Local 39 and worked as an insulator from 1941 until a few weeks prior to his death. His employment was by the "union hall" method wherein an employer contacts the union agent requesting workers for a particular job, and the agent then assigns available workers to the requested job. Mr. Osteen worked for many employers during his years as an insulator and appellee brought her claim against approximately 40 of these employers, including appellant. After a hearing before the one-judge Workmen's Compensation Court, the court found that mesothelioma was an occupational disease and, therefore, appellee was entitled to compensation under Neb. Rev. Stat. § 48-122 (Reissue 1978) in the amount of $100 per week, the amount to be divided between appellee and the then minor child, Mark, until Mark reached his majority. Thereafter, appellee would receive $100 per week for the remainder of her widowhood. Applying the so-called "last injurious exposure" rule, Judge Paul E. LeClair ordered Vaughn Insulation to pay the entire award. On rehearing, the

three-judge Workmen's Compensation Court affirmed the award in all respects except that it ordered appellant, Kiewit, to pay the entire award. Appellant assigns numerous errors. We affirm.

Appellant first argues that appellee's claim is barred by the statute of limitations which was in effect at the time Mr. Osteen was employed by Kiewit in 1974 and 1975. Those limitations, appearing at Neb. Rev. Stat. §§ 48-133 and 48-137 (Reissue 1968), bar claims for compensation not filed within 6 months of the occurrence of an injury or within 6 months after death and suits for compensation not filed within 1 year after the accident. In 1977 the statutes were changed to provide that notice of a claim to an employer be given "as soon as practicable after the happening thereof" and for a 2-year time limit on filing suits for compensation. §§ 48-133 and 48-137 (Reissue 1978).

Apparently, appellant is urging that the Workmen's Compensation Court's finding that appellant is liable amounts to a finding that Mr. Osteen's "injury" occurred while he was employed by Kiewit and, thus, the claim was not filed within 6 months of the "injury" since notice was not given of a claim until June 24, 1977. However, as will be more fully developed elsewhere in this opinion, the rule under which appellant was found liable is applied in cases where the onset of the occupational disease cannot be pinpointed as stemming from a distinct incident and, thus, the finding of liability by the lower court is not a finding that Mr. Osteen's "injury" occurred while he was in Kiewit's employ for statute of limitation purposes. The correct interpretation of the statute of limitations to be applied in this case appears in *Hauff v. Kimball*, 163 Neb. 55, 61, 77 N.W.2d 683, 687 (1956): "'Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be "injured" only when the accumulated effects of the

substance manifest themselves, which is when the employee becomes disabled and entitled to compensation; and the "date of injury," within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred, and the . . . period of limitations runs from that date . . . .'"

On February 1, 1977, Mr. Osteen ceased working and entered the hospital for diagnosis of an abdominal disorder. Cancer was subsequently discovered during surgery and Mr. Osteen died on March 18, 1977. An autopsy on that date disclosed that the cause of death was peritoneal mesothelioma, and claimant first became aware that the cause of death was employment related. Notice was given on June 24, 1977, and the petition was filed in the Workmen's Compensation Court on January 27, 1978. The earliest date upon which we could hold that the disease manifested itself in disability was February 1, 1977. Using that date as the "date of injury," it is plain that claimant gave notice and filed her petition within the statutory time limits.

Appellant next argues that there is no competent medical evidence that peritoneal mesothelioma is a compensable occupational disease under the Nebraska Workmen's Compensation Act. According to Neb. Rev. Stat. § 48-151 (Reissue 1978), "[t]he term occupational disease shall mean only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public are exposed." The Workmen's Compensation Court found that peritoneal mesothelioma is a compensable occupational disease, and its findings of fact have the force and effect of a jury verdict and will not be set aside unless clearly wrong. *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980).

The evidence demonstrates that the incidence of peritoneal mesothelioma is almost negligible in the population at large, but approaches 7 percent in

asbestos workers. According to one of appellee's expert medical witnesses, the incidence of this disease in the population in general "is very, very small, so small that it's hard to put a number on it. A number that you commonly see in the scientific literature is perhaps one in 10,000 deaths may be due to mesothelioma in the general population. But even that number, it's kind of a guess, because the incidence is so low." However, a study cited by the same witness, in which initially healthy asbestos workers were "followed" by researchers "to see what happened to them," found that approximately 7 percent eventually died of mesothelioma. Conversely, several studies which traced the employment history of men who had died of mesothelioma found that between 60 percent and 80 percent of those decedents had a history of prolonged exposure to asbestos in their employment. We find that there is sufficient competent medical evidence to support the Workmen's Compensation Court's finding that peritoneal mesothelioma is a compensable occupational disease.

Appellant next argues that the Workmen's Compensation Court erred in applying the so-called "last injurious exposure" rule to determine which employer should bear liability for payment of the award. According to this rule, where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the employer who most recently exposed the worker to the harmful substance is liable to pay the entire award. 4 Larson, Workmen's Compensation Law § 95.21 (1981). In some states, this rule is codified by statute. See, *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980); *Stanley v. Hinchliffe*, 395 Mich. 645, 238 N.W.2d 13 (1976). A number of jurisdictions follow this rule even in the absence of statute. See, *Holden v. Willamette Industries., Inc.*, 28 Or. App. 613, 560 P.2d 298 (1977); *Duaine Brown Chevrolet Co. v. Industrial Com'n*, 29 Utah 2d 478, 511 P.2d 743 (1973);

Bond v. Rose Ribbon & Carbon Mfg. Co., 42 N.J. 308, 200 A.2d 322 (1964). Nebraska has no statute stating rules for determining liability in the successive employer situation, so the issue is one of first impression in this state.

The alternative to imposing liability based upon the last injurious exposure would be to somehow apportion liability among all the employers who exposed Mr. Osteen to asbestos. This would involve devising a formula based upon some factor, such as length of exposure, severity of exposure, degree of aggravation of the first harmful exposure, wage rates, or any of a multitude of factors which could be utilized. We think if apportionment is to be the rule in Nebraska, the factor upon which it is to be based is necessarily the type of policy decision best left to the Legislature.

Although occasionally courts have applied the apportionment rule in the absence of statute, those cases which have done so have presented a situation involving successive separate, identifiable injuries, with one occurring during the claimant's employment with a prior employer and an aggravating injury occurring during a subsequent employment. See, *United Painters & Decorators v. Britton*, 301 F.2d 560 (D.C. Cir. 1962); *Dunbar Fuel Co. v. Cassidy*, 100 N.H. 397, 128 A.2d 904 (1957); *Quinn v. Automatic Sprinkler Co.*, 50 N.J. Super. 468, 142 A.2d 655 (1958); *Goetz v. Bulk Commodity Carriers*, 303 Minn. 197, 226 N.W.2d 888 (1975). We are aware of no cases in which a court has, in the absence of legislation, apportioned liability for a progressive occupational disease in which neither the onset of the disease nor the degree of aggravation by subsequent exposures can be accurately determined. Having no legislative guidance in the matter, we thus affirm the lower court's application of the "last injurious exposure" rule for the reasons set out below.

As noted above, there is no doubt that the disease which caused Mr. Osteen's death is an occupational disease which afflicts asbestos workers. However, it is

almost impossible to pinpoint which exposure "caused" the disease, since the claimant's expert medical witnesses agreed that no exposure to asbestos could be exonerated as the cause of the tumor. Thus, we are unable to assign liability to the employer whose exposure of Mr. Osteen to asbestos "caused" his occupational disease, since the inception of the disease cannot be pinpointed and, additionally, since it is believed that cumulative exposures are harmful as well. The application of the last injurious exposure rule eliminates this guesswork. As stated in *Tennessee Tufting Co. v. Potter*, 206 Tenn. 620, 630, 337 S.W.2d 601, 602 (1960), a case from a state where this rule is statutory, the purpose of the rule is "to avoid the issue when the disease or disability came into existence, which issue often involves difficulty, uncertainty and speculation."

In *Alloy Surfaces Company v. Cicamore*, 221 A.2d 480 (Del. 1966), the claimant employee suffered severe mouth and gum infection and lost all his teeth due to exposure to chrome compounds in his work. The Delaware court noted: "The present case is a good example of a situation where qualified specialists cannot trace the history of a disease with any satisfactory degree of certainty; the most they could say was that its development was a matter of months or years. It would indeed be a hardship to place that burden of proof upon the employee . . . ." *Id.* at 486. In the absence of statute, that court adopted the last injurious exposure rule, stating: "If the majority rule placing responsibility upon the last carrier, which we are now accepting as the law of this State, be deemed unjust, the remedy lies with the General Assembly." *Id.* at 487.

A reminder of the root purpose of workmen's compensation legislation appears in *Wilson v. Van Buren County*, 198 Tenn. 179, 186, 278 S.W.2d 685, 688 (1955): "[W]e are constrained to so interpret our Workmen's Compensation Law as will best serve the interests of employees who suffer from an occupational disease, rather than attempt an adjustment of their rights in the

light of equities that may exist between [successive employers]."

Holden v. Willamette Industries, Inc., 28 Or. App. 613, 560 P.2d 298, 301 (1977), found that the last injurious exposure rule is "particularly harmonious with the policy of liberal construction for the worker . . . ." The policy of liberal construction of the Workmen's Compensation Act for the benefit of the claimant is likewise the rule in Nebraska. *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N.W. 254 (1938).

Under the last injurious exposure rule, it is not always the case that the last employer of the claimant will be the one which produced the last injurious exposure. As stated in 4 Larson, Workmen's Compensation Law § 95.21 at 17-79 (1981): "In the case of occupational disease, liability is most frequently assigned to the carrier who was on the risk when the disease resulted in disability, *if the employment at the time of disability was of a kind contributing to the disease.*" (Emphasis supplied.) Thus, in the case where a claimant was not being exposed to the harmful substance by his employer at the time the disease manifested itself in disability, the procedure is as stated in *Underwriters at Lloyds, London v. Alaska Indus. Bd.*, 160 F. Supp. 248, 250 (D. Alaska 1958): "Rather than defeat the claim of the employee where the employment at the time of disability was not of a kind contributing to the disease, the employer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation."

The last injurious exposure, to be "injurious," must indeed bear a causal relationship to the disease. Howsation Law § 95.21 at 17-79 (1918): "In the case of that the exposure must be *of the type which could* cause the disease, given prolonged exposure. As described in *Mathis v. State Accident Insurance Fund*, 10 Or. App. 139, 499 P.2d 1331 (1972), an exposure which will support imposition of liability under this rule need not

be proved to have been a "material contributing cause" of the disease. Indeed, to so require would bring the employee back to Square One by requiring "proof of the unprovable and litigation of the unlitigable." *Holden v. Willamette Industries, Inc., supra* at 301. As Larson notes at 17-87: "[O]nce the requirement of some contributing exposure has been met, courts . . . will not go on to weigh the relative amount or duration of the exposure under various employers . . . . As a result, in some cases carriers and employers that have been on the risk for relatively brief periods, perhaps only a few weeks, have nevertheless been charged with full liability for a condition that had developed over a number of years." As noted by the Workmen's Compensation Court in its opinion and award on rehearing in this case: "[E]ven though liability imposed under this rule can have a harsh result, there will be a spreading of the risk when the total picture of asbestos litigation is considered and this rule is applied on a nationwide basis."

The Workmen's Compensation Court found that the evidence showed that the last injurious exposure of Mr. Osteen to asbestos fibers occurred while he was in the employ of the appellant. Coworkers of Mr. Osteen on the Kiewit job testified that on that job Mr. Osteen worked for several days, possibly as long as 3 weeks, with old insulation and products which contained asbestos. Claimant's expert medical witness testified that, in his opinion within a reasonable medical certainty, mesothelioma can occur within a lesser latency period than 5 years and that an exposure of less than 1 month could be causally related to the subsequent development of mesothelioma. In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably

deducible from it. *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980). We find there is sufficient evidence in the record to support the lower court's finding that the last injurious exposure occurred while Mr. Osteen was employed by appellant.

Appellant next claims that appellee's award should be limited to $89 per week, which was the statutory maximum compensation rate in effect at the time Mr. Osteen was employed by Kiewit. Neb. Rev. Stat. § 48-122 (Cum. Supp. 1974). The Workmen's Compensation Court awarded benefits of $100 per week, the statutory maximum in effect on February 2, 1977, when Mr. Osteen ceased working due to his disease. § 48-122 (Cum. Supp. 1976). This action was correct since, as noted above, in the case of an occupational disease such as this one, the "'date of injury,' within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred . . . ." *Hauff v. Kimball*, 163 Neb. 55, 61, 77 N.W.2d 683, 687 (1956). According to *Chadd v. Western Cas. & Sur. Co.*, 166 Neb. 483, 89 N.W.2d 586 (1958): "All calculations to be made under the provisions of section 48-121, R.R.S. 1943, and amendments thereof, have reference to wages, percentages, and results as of the time of the injury." (Syllabus of the court.) Since the date of injury in this case was February 1, 1977, the lower court correctly applied the rate in effect on that date.

Finally, appellant argues, apparently, that appellee is not entitled to attorney fees in this court because of certain payments made to her by Jelco, Inc., and A. H. Bennett Company pursuant to stipulations between those companies and appellee. Basically, the stipulations stated that in return for a payment to appellee of $1,250 from each company, appellee would present no evidence against either company, would not resist a motion to dismiss made at the close of her case by either company, and would credit the amount received against any possible award made against the stipulating company. Appellant argues that this amounts to a modification of the award on appeal which would forbid an

allowance of attorney fees in this court under Neb. Rev. Stat. § 48-125 (Reissue 1978), since the stipulations were "accepted by the Nebraska Workmen's Compensation Court on rehearing."

On rehearing, the stipulations were offered into evidence, at which time the following colloquy took place between the court and various attorneys: "THE COURT: The mere fact that the exhibit is offered and the fact that the exhibit may be received would not indicate that the Court would necessarily feel or find that all items contained therein are absolutely verity and truthful.

"MR. STOUFFER: All right.

"MR. NEVINS: I don't see how that could be binding on the Court at all.

"THE COURT: I agree with you, Mr. Nevins."

It is difficult to see how this amounts to a reduction of the award on appeal. The payments were to be credited only in the event that liability was assessed against either Jelco, Inc., or A. H. Bennett Company. Such was not the case either on rehearing or in this court. Appellant has received no reduction in the award against it in this case on appeal, and, thus, appellee is entitled to an attorney fee of $2,500 in this court.

Appellant's assignments of error are without merit. The award of the Workmen's Compensation Court on rehearing is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD D. NOKES, APPELLANT.

307 N.W.2d 521

Filed June 26, 1981. No. 43751.

1. **Post Conviction.** An evidentiary hearing in a proceeding for post conviction relief may be denied if the trial court finds, on examination of its files and records, that the proceeding is without foundation.
2. **Post Conviction: Motion to Vacate.** A motion to vacate a judgment and

sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Duane L. Nelson for appellant.

Paul L. Douglas, Attorney General, and Lynne Fritz for appellee.

Heard before KRIVOSHA, C.J. BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding for post conviction relief brought under Neb. Rev. Stat. § 29-3001 (Reissue 1979). In 1974 the defendant entered pleas of guilty to one count of first degree murder and one count of second degree murder. He was sentenced to consecutive life sentences on each count. The convictions and sentences were affirmed on direct appeal in *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776 (1975).

On April 29, 1980, the defendant filed a motion for post conviction relief which alleged that his guilty pleas had been obtained in an unconstitutional manner. The District Court, after reviewing the files and records of the case, overruled the motion without granting an evidentiary hearing.

The defendant alleges on appeal that the District Court erred in not conducting an evidentiary hearing on the adequacy of defense counsel and misconduct by the prosecution in obtaining defendant's guilty pleas. This court has held that an evidentiary hearing may be denied if the trial court finds, on examination of its files and records, that the proceeding is without foundation. *State v. Nicholson*, 183 Neb. 834, 164 N.W.2d 652 (1969); *State v. Ronzzo*, 181 Neb. 16, 146 N.W.2d 576 (1966).

On the direct appeal in this case, *State v. Nokes, supra*, the defendant raised the issues of effective assistance of counsel and the voluntariness of the defendant's guilty

pleas. As to the latter issue, this court stated: "In State v. Hall, 188 Neb. 130, 195 N.W.2d 201, we held that the standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162. Not only was the plea here a clearly voluntary and intelligent choice among alternative courses of action, there was also ample evidence to establish that the murder of Mrs. Hoyt was premeditated." *Id.* at 848, 224 N.W.2d at 779.

As to the defendant's contention that he had been denied effective assistance of counsel, we stated: "Here Harold D. Nokes' trial counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and conscientiously protected the interests of his client within the test standards set out in State v. Leadinghorse, *ante* p. 485, 222 N.W.2d 573." *Id.* at 850, 224 N.W.2d at 780.

The issues raised by the defendant in this post conviction proceeding were decided adversely to him on the direct appeal. These matters will not again be considered here. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. *State v. Lacy*, 198 Neb. 567, 568, 254 N.W.2d 83 (1977); E.g., *State v. McDonnell*, 192 Neb. 500, 222 N.W.2d 583 (1974). See, also, Hoffman, *Trial Court Responses to Claims for Relief Under the Nebraska Post Conviction Act: A Taxonomy*, 58 Neb. L. Rev. 355 (1979).

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY A. JONES, APPELLANT.

307 N.W.2d 126

Filed June 26, 1981. Nos. 43782, 43783.

1. **Final Orders: Appeal and Error.** An order overruling a special appearance is not a final order from which an appeal can be taken.
2. ____: ____. In the absence of a final order which disposes of a case, this court has neither authority nor jurisdiction to act on an attempted appeal and the same will be dismissed.
3. **Constitutional Law: Jurisdiction: Courts.** Article III, § 2 of the Constitution of the United States, which grants original jurisdiction to the Supreme Court of the United States in cases in which a state may be a party, is neither a mandatory nor an exclusive grant of jurisdiction so as to deprive the state courts of jurisdiction in cases involving a state and one of its citizens.
4. **Judgments: Appeal and Error.** Where the record affirmatively shows that the only ruling complained of is clearly right and plainly in accordance with law, an appeal will be dismissed as frivolous.

Appeal from the District Court for Merrick County: JOHN C. WHITEHEAD, Judge. Appeals dismissed.

Larry A. Jones, pro se.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

PER CURIAM.

These appeals involve two automobile speeding violations allegedly occurring on August 15, 1980, as to case No. 43782, and on February 24, 1980, as to case No. 43783. Both cases were prosecuted in the county court of Merrick County, appealed to the District Court for Merrick County, and then to this court, where they were consolidated for argument. The appellant, Larry Jones, appeared pro se, and his brief contains no statement of the case, no assignments of error, no statement of facts, and only some propositions of law set forth in the most

vague form as a part of an argument that in itself is at best confusing and irrelevant. Appellant requests no relief, but the one conclusion we can make from the brief and his oral argument is that he believes that only the Supreme Court of the United States has jurisdiction over either of these cases. This belief, it would seem, is based on Article III, § 2, clause 2, of the Constitution of the United States. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction." We dismiss both appeals as frivolous.

In case No. 43782, no final disposition was ever made by the county court. Appellant filed a special appearance challenging the jurisdiction of the court. He appealed to the District Court the order of the county court overruling his special appearance. The District Court dismissed the appeal as not timely and not involving an appealable decision, and remanded the cause to county court for further proceedings. That action was correct. An order overruling a special appearance is not a final order from which an appeal can be taken. *Root v. School Dist. No. 25*, 183 Neb. 22, 157 N.W.2d 877 (1968). In the absence of a final order which disposes of a case, this court has neither authority nor jurisdiction to act on an attempted appeal and the same will be dismissed. *Busboom v. Gregory*, 179 Neb. 254, 137 N.W.2d 825 (1965).

A final judgment of conviction was had in case No. 43783. Although no question of the sufficiency of the evidence is raised, we note that the evidence fully supports the action of the trial court. We pass only on appellant's claim that the state courts lack jurisdiction because of the Constitution of the United States. The applicability of Article III, § 2, of the U.S. Constitution, relied upon by the appellant as granting exclusive authority to the Supreme Court of the United States to hear his cases, was succinctly stated by that very Court in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 446, 65 S. Ct. 716, 89 L. Ed. 1051 (1945): "It is not enough that a State is plain-

tiff. The original jurisdiction is confined to civil suits where damage has been inflicted or is threatened, not to the enforcement of penal statutes of a State." The Court goes on to explain that whatever the jurisdiction of the Supreme Court under that provision might be, it is not mandatorily exclusive. "Clause 2 does not grant exclusive jurisdiction to this Court in the cases enumerated by it. . . . And it has been held that the exercise of that jurisdiction is not mandatory in every case. . . . The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice." *Id.* at 464-65.

Jurisdiction of the county court of Merrick County is clearly present as provided by Article V, § 1, of the Constitution of the State of Nebraska and Neb. Rev. Stat. § 24-517 (Reissue 1979).

When the record shows affirmatively that the only ruling complained of is clearly right and plainly in accordance with law, an appeal will be dismissed as frivolous. *In re Estate of Landon*, 98 Neb. 706, 154 N.W. 215 (1915). The appeals are dismissed.

APPEALS DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
KENNETH H. STABLER, APPELLANT.

306 N.W.2d 925

Filed June 26, 1981. No. 43837.

1. **Criminal Law: Evidence.** In determining whether two charges constitute the same offense, the test to be applied is whether each charge requires proof of different facts or evidence.
2. **Criminal Law.** A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act.

3. **Criminal Law: Constitutional Law: Double Jeopardy.** The rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. The constitutional inhibition is directed to the identity of the offense and not to the act.
4. **Criminal Law: Lesser-Included Offense.** A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Gerald L. Soucie for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

BOSLAUGH, J.

The defendant appeals from a conviction in District Court for driving while intoxicated, third offense, following his conviction in county court for refusal to submit to a chemical test under Neb. Rev. Stat. § 39-669.08 (Reissue 1978). Both charges grew out of the same incident. The defendant contends that his plea in bar, based on his conviction on the refusal charge, should have been sustained by the trial court.

The record shows the defendant was arrested at approximately 9 p.m. on April 26, 1980, near the intersection of 22nd and Vine Streets in Lincoln, Nebraska. The defendant's vehicle was observed stopped in a no-parking area on 22nd Street with the defendant in the driver's seat. The engine was running and the lights were on. As the police officer approached the vehicle, it moved forward several feet. The officer requested that the defendant place the vehicle in park and get out of the car. The defendant appeared to be intoxicated, and the officer observed a beer can next to the defendant. He

also smelled the odor of alcohol coming from the vehicle. After a preliminary breath test had been administered, the defendant was placed under arrest and taken to police headquarters.

At the police station the arresting officer read an implied consent form to the defendant. The defendant was asked to submit to a breath test but he refused. The defendant was then charged with refusal to submit to a chemical test under the implied consent statute, § 39-669.08, and with driving while intoxicated, third offense, under § 39-669.07.

On May 9, 1980, the defendant was found guilty in county court on the refusal charge and was sentenced to 7 days in jail and his operator's license suspended for 6 months.

On May 15, 1980, the defendant filed a plea in bar in the District Court, alleging the conviction on the refusal charge barred the prosecution for driving while intoxicated. The plea in bar was overruled.

The evidence at the trial in the District Court consisted primarily of the transcript of the evidence received in the county court at the trial on the refusal charge. The transcript contained the arresting officer's testimony on the issue of the defendant's refusal to take the chemical test and included the officer's opinion that the defendant was in fact intoxicated at the time he was arrested. The trial court found the defendant guilty of driving while under the influence of alcohol and sentenced him to 1 to 2 years' imprisonment.

The defendant contends his conviction and sentence for driving while under the influence violated the double jeopardy clause of the fifth amendment to the U.S. Constitution. Since the transcript of the refusal trial was the basis of the conviction for driving under the influence, the defendant argues they were one and the same offense. In determining whether two charges constitute the same offense, the test to be applied is whether each charge requires proof of different facts. *State v. Robinson*, 202 Neb. 210, 274 N.W.2d 553 (1979).

In *State v. Goodloe*, 197 Neb. 632, 250 N.W.2d 606 (1977), we upheld convictions for willful reckless driving, third and subsequent offenses, and operation of a motor vehicle to avoid arrest. Addressing the defendant's double jeopardy argument in that case, we stated at 634, 250 N.W.2d at 609: "This court has held that a distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. Jeppesen v. State, 154 Neb. 765, 49 N.W.2d 611 (1951). In that case we stated: 'Neither in the Constitution of the United States nor in the Constitution of Nebraska is there any prohibition against successive prosecutions if the wrongful act is the cause of separate and distinct offenses.' "

It is clear from reading the statutes involved in this case that they create separate and distinct offenses. A conviction for refusal to submit to a chemical test requires proof that the defendant was advised of the consequences of refusing; the defendant was requested to provide a sample of his blood, breath, or urine; and the defendant refused to submit a sample. None of these facts are elements of the crime of driving while under the influence.

The defendant's contention that driving under the influence is a lesser-included offense of the crime of refusal is equally without merit. A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. *State v. Aby*, 205 Neb. 267, 287 N.W.2d 68 (1980).

In order to convict the defendant of the crime of driving while under the influence, it was necessary for the prosecution to prove beyond a reasonable doubt that the

defendant was "intoxicated" within the meaning of the statute. Evidence of this fact was contained in the officer's testimony at the refusal trial, but intoxication was not an element of the offense of refusal to submit to a chemical test.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. MIGUEL V. FLORES, APPELLANT.

307 N.W.2d 523

Filed June 26, 1981. No. 43965.

1. **Jury Trials: Municipal Ordinances: Constitutional Law.** The Legislature may provide for the trial of petty offenses in violation of a city or village ordinance without a jury when Article I, § 6, of the Constitution of Nebraska is not violated.
2. ____:____:____. A defendant who is charged with the violation of a city ordinance, with a maximum authorized penalty of 6 months' incarceration, is not entitled to a jury trial under the U.S. Constitution.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

William H. Mecham for appellant.

Herbert M. Fitle, Omaha City Attorney, Gary P. Bucchino, and Richard M. Jones for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, McCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

BOSLAUGH, J.

The defendant appeals from a judgment of the District Court affirming his conviction for damage to property in violation of a municipal ordinance of the city

of Omaha, § 20-158. The maximum penalty under the ordinance was a fine of $500 and 6 months' imprisonment.

The defendant was arraigned on September 10, 1980, and trial was set for September 24, 1980. A written demand for a jury trial was filed on September 16, 1980. It was denied on September 17, 1980. A trial to the court resulted in defendant's conviction. He was fined $350 and sentenced to 30 days in the county jail. The assignments of error relate to the denial of his demand for a jury trial.

The statute providing for jury trials in the municipal court excepts "criminal cases arising under city or village ordinances." Neb. Rev. Stat. § 24-536 (Reissue 1979). In a prosecution under a similar municipal ordinance, we stated: "Under the city ordinance applicable, the maximum possible exposure to imprisonment of the defendant was 6 months. It was not required that he have a jury trial under the United States Constitution. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, recently reaffirmed in Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437. The Nebraska statute, section 24-536, R.S. Supp., 1972, excludes criminal offenses of the nature involved in this case from the availability of a jury trial. In State v. Amick, 173 Neb. 770, 114 N.W.2d 893, we held that: 'It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury when Article I, section 6 of the Constitution is not violated. * * *.' See, also, State v. Peterson, 183 Neb. 826, 164 N.W.2d 649." *State v. Johnson*, 191 Neb. 535, 537, 216 N.W.2d 517, 519 (1974).

The defendant in this case had no constitutional or statutory right to a jury trial.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RALPH E. THOMAS, APPELLANT.

307 N.W.2d 128

Filed June 26, 1981. No. 43982.

Criminal Law: Sentences. When sentencing a criminal defendant to a term of imprisonment under the indeterminate sentencing statute, the minimum limit of the sentence fixed by the court shall not be less than the minimum provided by law nor more than one-third the maximum term. Neb. Rev. Stat. § 83-1,105 (Reissue 1976).

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed as modified.

Bradley E. Barrows for appellant.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

BRODKEY, J.

Ralph E. Thomas, the defendant and appellant herein, appeals to this court from his sentence imposed by the District Court of York County, Nebraska, for the offense of carrying a concealed weapon, in violation of Neb. Rev. Stat. § 28-1202 (Reissue 1979). The defendant was originally charged in a complaint filed on August 22, 1980, with one count of carrying a concealed weapon and one count of possession of a firearm by a felon, in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1979). On October 24, 1980, the defendant entered into a plea bargain whereby he pled guilty to the concealed weapons charge, and the possession of a firearm count of the complaint was dismissed. On December 5, 1980, Thomas was sentenced to an indeterminate term of not less than 3 nor more than 5 years' imprisonment in the Nebraska Penal and Correctional Complex. We affirm as modified.

In his brief on appeal, the defendant alleges the following assignments of error: (1) The District Court erred by imposing a minimum limit to the indeterminate sentence which exceeds one-third the maximum term; and (2) The sentence imposed by the District Court is excessive.

Thomas was convicted of carrying a concealed weapon, which crime is a Class IV felony as defined in § 28-1202. The penalty for a Class IV felony under Neb. Rev. Stat. § 28-105 (Reissue 1979) is a maximum of 5 years' imprisonment, a $10,000 fine, or both, with no prescribed minimum. The trial court sentenced the defendant to an indeterminate term of 3 to 5 years' imprisonment. The indeterminate sentencing statute, Neb. Rev. Stat. § 83-1,105 (Reissue 1976), provides that: "[T]he minimum limit fixed by the court shall not be less than the minimum provided by law *nor more than one-third of the maximum term* . . . ." (Emphasis supplied.) See, also, *State v. Sharski, ante* p. 122, 306 N.W.2d 592 (1981); *State v. Miles*, 194 Neb. 128, 230 N.W.2d 227 (1975); *State v. Suggett*, 189 Neb. 714, 204 N.W.2d 793 (1973).

In the present case the minimum portion of the indeterminate sentence fixed by the trial court, 3 years, exceeds by 16 months the proscription of one-third of the maximum sentence of 5 years. Under § 83-1,105, as conceded by the State in its brief on appeal, defendant's minimum sentence should have been 20 months, rather than the 3 years which the trial court imposed.

Under Neb. Rev. Stat. § 29-2308 (Reissue 1979), this court is authorized to reduce the sentence imposed by the District Court when, in our opinion, the sentence is excessive. In this case, as demonstrated above, the sentence imposed by the trial court exceeded the maximum allowed minimum penalty for a Class IV felony. The sentence imposed by the trial court must, therefore, be modified; and we determine that the minimum limit of the defendant's sentence should be 20 months' imprisonment in the Nebraska Penal and

Correctional Complex.

In reference to the defendant's second assignment of error, we have reviewed the record forwarded to this court and have determined that the maximum term of imprisonment imposed by the trial court is not excessive. Even discounting the favorable terms of the plea bargain, in which another pending charge against the defendant was dismissed, we are of the opinion that Thomas' record indicates that he is not entitled to any reduction of his sentence. His criminal record is lengthy and includes incarceration in the Oklahoma State Prison for assault with a deadly weapon and also for second degree burglary. We believe that the trial court was fully justified in sentencing the defendant to imprisonment, and that the sentence imposed by the court is not excessive nor an abuse of the court's discretion.

For the reasons stated above, the judgment of the trial court is affirmed, and the sentence imposed is ordered modified to meet the required statutory limitations.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, COMPLAINANT, V. MERRITT E. JAMES, RESPONDENT.

307 N.W.2d 524

Filed June 26, 1981. No. 44004.

Original action. Judgment of reprimand.

On motion for the court.

PER CURIAM.

The respondent, Merritt E. James, has filed with this court a conditional admission of guilt of the formal

charges filed against him by the Counsel for Discipline of the Nebraska State Bar Association.

Respondent is charged with a violation of Canon 6, DR 6-101(A)(3), and Canon 7, DR 7-101(A)(2), and with a violation of his license to practice law as provided in Neb. Rev. Stat. § 7-104 (Reissue 1977).

While representing a claimant in the Workmen's Compensation Court, the respondent recovered an award which included the amount of $821.25 which had been paid by Blue Cross Blue Shield of Nebraska. Pursuant to agreement, the check for $821.25 was mailed to Blue Cross Blue Shield of Nebraska for endorsement with respondent's check for $547.50, the amount of the recovery, less a one-third attorney fee. The check for $821.25 was endorsed and returned to respondent with a letter that his check would not be deposited for 1 week. Respondent's check to Blue Cross Blue Shield of Nebraska was deposited and was returned marked insufficient funds. After discussion with the respondent, the amount of the check was sometime later paid over to Blue Cross Blue Shield of Nebraska.

The respondent, having failed to use a trust account for client's funds and having failed to promptly transmit client's funds to the client, is guilty of unprofessional conduct and is hereby publicly reprimanded for conduct violative of the Canons of Ethics and of his oath as a member of the bar of this court.

JUDGMENT OF REPRIMAND.

STATE OF NEBRASKA, APPELLEE, V. CHARLES E. JOHNSON, APPELLANT.

307 N.W.2d 525

Filed June 26, 1981. No. 44054.

1. **Misdemeanors: Sentences.** Where an individual is convicted of a misdemeanor and given an indeterminate sentence which is to be served in an institution under the jurisdiction of the Department of Correctional Services, the provisions of Neb. Rev. Stat. § 83-1,105 (Reissue 1976) should apply.
2. **Convictions: Probation and Parole.** No defendant, once convicted, is entitled to be placed on probation as a matter of law.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed as modified.

Clay B. Statmore for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

KRIVOSHA, C.J.

The appellant, Charles E. Johnson, appeals from a judgment entered by the District Court for Lancaster County, Nebraska, finding Johnson guilty of two counts of misdemeanor issuing a bad check in violation of Neb. Rev. Stat. § 28-611 (Reissue 1979). Johnson was sentenced to an indeterminate term of ½ year to 1 year in an institution under the jurisdiction of the Department of Correctional Services for each count, the second sentence to be served consecutively to the first with credit being given for time already spent in jail. The record reflects that originally Johnson was charged with two counts of felony issuing a bad check. Pursuant to a plea agreement the State agreed to dismiss the felony charges and Johnson pled "no contest" to the two counts of misdemeanor issuing a bad check.

Johnson now maintains that the trial court committed

three errors, justifying a reversal of his conviction. The errors assigned by Johnson are as follows: (1) The trial court should not have found appellant guilty upon his plea of "no contest" because of a lack of factual basis upon which to make such a finding; (2) The sentence of the trial court was excessive; and (3) The trial court erred and abused its discretion in not placing defendant on probation.

We turn first to the second assignment of error to the effect that the sentence of the trial court was excessive. We have not heretofore specifically ruled on the question of whether Neb. Rev. Stat. § 83-1,105 (Reissue 1976) applies to a misdemeanor conviction. Section 83-1,105 provides that: "Except where a term of life is required by law, in imposing an indeterminate sentence upon the offender, the court may: (1) Fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law . . . ." We now believe it appropriate to declare that where an individual is convicted of a misdemeanor and given an indeterminate sentence which is to be served in an institution under the jurisdiction of the Department of Correctional Services, the provisions of § 83-1,105 should apply. We emphasize, however, that the rule applies in only those misdemeanor cases in which the defendant has been given an indeterminate sentence and ordered to serve the indeterminate sentence in an institution under the jurisdiction of the Department of Correctional Services. In view of our action herein, it is necessary that the minimum sentences given Johnson be modified and reduced from ½ a year to ⅓ of a year.

Turning then to Johnson's first assignment of error to the effect that his plea of no contest should not have been accepted because of a lack of factual basis upon which to make such a finding, we reject the assignment. An examination of the record makes it manifestly clear

that there was sufficient evidence from which the court could conclude that Johnson was aware that the checking account had been closed and that no money had been put into the account after October 3, 1979.

After Johnson entered his plea, the court asked the prosecutor to relate to the court the facts underlying the charge. We have heretofore approved this practice where the accused pleads either guilty or "no contest." See, *State v. Daniels*, 190 Neb. 602, 211 N.W.2d 127 (1973); *State v. Hill*, 204 Neb. 743, 285 N.W.2d 229 (1979). Specifically, the deputy county attorney, in the presence of Johnson, stated: "The state's evidence would further show that the defendant [Johnson] and Marvin Mitchell continued to write checks and cashed in checks on the account after they had received the notice and knowing that the account had been closed and there was no money in the account at the time the checks were written. And further, the State would call as a witness, Marvin Mitchell, who would testify substantially as I have related, that the defendants were aware that the checking account had been closed and there was no money had been [sic] put in the account at the time that the checks were written, at a time after October 3rd, 1979."

Johnson neither objected to the statements nor offered anything to contradict the statements made by the deputy county attorney. These statements, together with the police report and the presentence report, were more than sufficient to justify the court's finding Johnson guilty as charged. The assignment of error is rejected.

Finally, with regard to the third assignment of error that the trial court erred and abused its discretion in not placing Johnson on probation, we likewise reject the assignment. No defendant, once convicted, is entitled to be placed on probation as a matter of law. See *State v. Swails*, 195 Neb. 406, 238 N.W.2d 246 (1976). In the instant case the record discloses that after Johnson was charged, and while he was awaiting trial, he was in-

volved in an assault upon a University of Nebraska-Lincoln coed. The trial court obviously realized that Johnson had no intention of being a law-abiding citizen and required some period of incarceration as punishment for his crimes. In sentencing Johnson the trial court said: "I guess the thing that bothers me is the problems you've had since this offense; particularly the assault that took place down at the University. Quite frankly, because of that, I don't think I can put you on probation. I just feel there would be a sufficient likelihood that you would engage in other criminal conduct and I just don't feel that I can take that chance." The action of the trial court was entirely justified and did not constitute an abuse of discretion. Absent evidence of an abuse of discretion, a sentence imposed by the trial court within the statutory limits should be affirmed. See *State v. Carey*, 199 Neb. 288, 258 N.W.2d 141 (1977).

The judgment of the trial court finding Johnson guilty upon his plea of no contest and sentencing him, except as modified herein, is affirmed.

AFFIRMED AS MODIFIED.

BEVERLY ANN GRADY, APPELLEE, V. GILBERT DEAN GRADY, APPELLANT.

307 N.W.2d 780

Filed July 2, 1981. No. 43113.

1. **Contempt.** One cannot be held in contempt of court for acts which became prohibited by a court order entered subsequent to their commission.
2. ——. An action to enforce a court order is normally a mere civil contempt and requires the appropriate standard of proof applicable thereto.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed as modified.

Bauer, Galter, Geier, Flowers & Thompson for appellant.

Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal from an order entered by the District Court for Lancaster County, Nebraska, finding the appellant, Gilbert Dean Grady, to be in contempt of court. The parties to this action were formerly husband and wife, having been divorced on May 12, 1978. The case was appealed to this court and was affirmed here at *Grady v. Grady*, 204 Neb. 595, 284 N.W.2d 402 (1979). Although attempts were made to do so by the appellant, the decree was never superseded. We will not repeat the facts of the case or the details of the decree approved by the trial court except so far as the same are pertinent to this discussion as they are contained in *Grady v. Grady, supra.*

According to the provisions of the decree, the appellee, Beverly Ann Grady, was awarded all the capital stock in two corporations, the principal assets of which were two motels. The businesses operated by the appellant included, among other things, six corporations. In both the principal case and the evidence presented at this hearing, there is considerable evidence that it was the custom and practice of the appellant to regularly transfer comparatively large sums of money between the various corporations as the requirements of those corporations manifested themselves. There was also evidence of substantial purchases made by a principal company of supplies and equipment which in turn were allocated to the various corporations. The bookkeeping practices could only be described as somewhat bizarre, consisting of a yearend reconciliation by a firm of accountants of the various debts and credits that should be accorded to the various corporations for income tax purposes.

In December 1978, 7 months after the decree was

entered, appellee filed a motion for contempt citation against appellant, alleging the terms of the decree with regard to the properties to be transferred to her, and alleging that appellant had failed to release certain liens, as ordered, and that appellant had improperly removed money from those corporations after the entry of the decree, all done willfully, contemptuously, and without just cause. The trial court in its order found three principal grounds for holding the appellant in contempt: (1) In failing to release secondary mortgages against property held by Carpenter Enterprises, Inc., and Flamingo Motels, Inc., the motel corporations that had been awarded to Beverly Ann; (2) In failing to turn over all the assets of those two corporations pursuant to the court's order of May 12, 1978, and a further order of August 7, 1978, and in diverting assets of those corporations without specifically accounting for such withdrawals; and (3) In failing to turn over all assets of the corporations to Beverly Ann Grady as ordered by the court, in that Gilbert Grady caused policies of insurance for said corporations to be canceled where he had no authority to do so, apparently appropriating any returned premium to his own use. The evidence is clear that after the entry of the decree, the appellant, Gilbert Dean Grady, failed and refused to turn over to Beverly Ann the stock certificates in the two corporations until August 1978. From and after the entry of the decree, and even after August 10, 1978, he continued to operate the motels, expending money from various checking accounts, apparently collecting the receipts, and he had not, even at the date of the hearing in June 1979, produced an accounting of those transactions.

There was also evidence that between the date of the submission of the case in January 1978 and May 1978 there were a considerable number of transactions involving those same two motels, including a considerable expenditure of funds which is not accounted for. The

appellant appropriately points out that one cannot be held in contempt of court for acts which became prohibited by a court order entered subsequent to their commission. A contrary ruling would have the effect of an ex post facto law. See *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 66 N.W. 624 (1896). The point is well taken. The trial court's order, insofar as it held the appellant in contempt for removing said sums from the corporations and failing to account for them prior to the entry of the decree, was in error.

Appellant also assigns as error that the trial court was in error in holding that there was evidence sufficient to establish that the appellant's conduct was willful and contumacious. It is clear, insofar as the second and third principal grounds for contempt are concerned, that the appellant's argument is not well taken. On and after May 12, 1978, the appellant was under a continuing obligation to obey the court's order in transferring the stock of the two corporations to the appellee. He did not do so until 3 months later, and, further, continued to improperly divert assets until the time of the hearing. He was guilty of willful contempt. Further, in his actions with respect to all financial transactions involving those corporations on and after the date of the decree, those acts were totally unauthorized and were in willful disobedience to the court's order. The appellant suggests that somehow he may be excused from his actions involving corporations which the court had directed to be transferred to another by saying that this was his usual method of operation. One usually does not operate or remove funds from a corporation that one no longer owns or controls.

As to item three, the evidence is clear that an insurance policy belonging to the company was in fact canceled after the premium had been paid and the proceeds applied to the personal interest of the appellant, Gilbert Grady. This was in open defiance and

disobedience of the trial court's order.

Insofar as the first principal item of the contempt proceedings, in failing to release the secondary mortgages, appellee introduced evidence of the various financial transactions entered into by the appellant. The appellant asserted simply that he could not pay off the secondary mortgages by reason of certain adverse tax consequences resulting from forced sales of heavily mortgaged but highly appreciated real estate, and that he could not release those secondary mortgages because he simply did not have the funds with which to do so. There was no evidence introduced by the appellee which would suggest otherwise. We agree with the appellant that there is not sufficient evidence to show that the appellant had the means with which to discharge the secondary mortgages.

In its order holding the appellant in contempt of court, the trial court sentenced the appellant to a term of 90 days in the county jail of Lancaster County. Any remaining sentence could be suspended by releasing the secondary mortgages against properties owned by Carpenter Enterprises, Inc., and Flamingo Motels, Inc., and by accounting for and returning the assets of Carpenter Enterprises, Inc., and of Flamingo Motels, Inc., which the court found appellant had improperly diverted beginning in December 1977. We modify that order. We affirm the sentence of the trial court, but modify the terms for the appellant to purge himself of contempt by striking as a condition the failure to release secondary mortgages, as appellee did not prove in the trial court that appellant had the capacity or funds to release said mortgages. We further modify by confining the terms of repayment in paragraph two from the date of the decree, May 12, 1978, and by striking from said order any requirement that the appellant be held in contempt for expenditures occurring prior to the date of the decree. By reason of the considerable period that elapsed between the date of submission and the date of the decree, it is

apparent that the evidence on which the trial court based its decision was only partially true at the date the decree was entered. However, this was the responsibility of appellant's counsel. There may exist some appropriate means to modify that decree; we merely state that one cannot be held in contempt for actions which took place in advance of a date when one was under a direction not to commit them.

The appellant suggests on brief and oral argument that the contents of a certain sealed deposition of the appellant's accountant was not read or considered by the trial court. This matter is considered de novo by this court and the contents of the deposition of the accountant are not persuasive. They merely relate to the rather bizarre accounting practices and financial practices, as discussed above, of the appellant's business conduct. There is no direct evidence that a copy of the deposition was not read or that the deposition was not opened and resealed; but, regardless of that fact, there is no persuasive evidence contained therein which would purge the appellant of the contempt of the court's order, essentially of looting corporations that he was under direction to turn over to another.

We have stated that an action to enforce a court order is normally a mere civil contempt and requires the appropriate standard of proof applicable thereto instead of the stricter "proof beyond a reasonable doubt" standard applied to criminal contempts. See *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980). This being a civil contempt, we apply the standard of proof applicable in a civil proceeding. However, the contempt of the appellant is so clearly established that it would satisfy even the stricter standard of proof were the same to apply.

The judgment and sentence of the District Court holding the appellant in contempt, as modified, are affirmed.

AFFIRMED AS MODIFIED.

JOHN E. JOHNSON, APPELLEE, V. SHARON C. JOHNSON, APPELLANT.

307 N.W.2d 783

Filed July 2, 1981. No. 43269.

1. **Divorce: Words and Phrases.** When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together, the marriage is irretrievably broken.
2. **Divorce: Property Division.** The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case.
3. ____: ____. Generally speaking, awards in cases of this kind vary from one-third to one-half the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so where the marriage is of long duration and the parties are the parents of the children involved.
4. **Property Division: Appeal and Error.** This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
5. **Property Division: Interest.** The trial court has the inherent power, in adjusting the rights of the parties, to provide that a money allowance to be paid in installments shall not draw interest until a certain date.
6. **Divorce: Property Division.** In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held.
7. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under Neb. Rev. Stat. § 42-365 (Reissue 1978) is one of reasonableness.
8. **Appeal and Error.** Errors assigned but not discussed will generally not be considered by the Supreme Court.
9. **Divorce: Attorney Fees.** There is no rule which requires a trial court to necessarily award attorney fees in accordance with the value of the services in a divorce case. The award of attorney fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.

Appeal from the District Court for Kimball County: ROBERT O. HIPPE, Judge. Affirmed.

Winner, Nichols, Meister & Douglas, P.C., for appellant.

Martin, Mattoon, Matzke & Mattoon for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, BRODKEY, and HASTINGS, JJ., and HICKMAN, District Judge.

HICKMAN, District Judge.

This dissolution of marriage action was commenced on April 25, 1979, in Kimball County, Nebraska, by petitioner husband, John E. Johnson, the appellee herein, who will be referred to as John, against the respondent wife, Sharon C. Johnson, the appellant herein, who will be referred to as Sharon. Trial was held on November 6 and 7, 1979, and the District Court, on December 17, 1979, entered a decree dissolving the marriage, awarding custody of the minor children to Sharon, subject to John's right of reasonable visitation, ordering John to pay $250 per month per child for child support, and dividing the property. This appeal followed. Sharon sets forth 20 assignments of error, but has abandoned 5 assignments, and the remaining 15 can be grouped as follows: The trial court erred (1) in finding that the marriage was irretrievably broken and awarding a dissolution of the marriage rather than a decree of separate maintenance; (2) in awarding Sharon an inequitable division of the property; (3) in failing to award interest on the unpaid balance of the payments ordered; (4) in not awarding Sharon one-half of the value of the prepaid expenses on growing crops; (5) in determining certain values and in making mathematical errors in the court's findings and in the computation of values placed on specified items of real and personal property; (6) in determining that certain gifts were made to the petitioner alone rather than to the parties jointly; (7) in failing to award alimony; (8) in awarding inadequate child support because the award made no provision for an increase in child support as each of the children reaches majority; and (9) in awarding inadequate attorney fees.

John and Sharon were married October 26, 1957,

when they were 20 years and 19 years old, respectively. As a result of the union, five children were born, the first of which died shortly after birth. The remaining four children ranged in age from 12 years to 17 years at the time of trial.

John graduated from high school in 1955, and thereafter served in the Navy for approximately 2 years. Following marriage he commenced farming and has become a successful wheat farmer in Kimball County. After her high school graduation, Sharon worked as a secretary until the marriage, and during the 22 years since has fulfilled her obligations as a loyal and helpful farm wife and mother in the home and on the farms which have been acquired. At trial the health of both parties was not an issue.

The marriage relationship first became strained in 1973 when Sharon learned of John's extramarital activities and confronted him about them. After discussions, Sharon forgave John and they continued to live together, but, according to John, Sharon did not forget and thereafter continually nagged at him and kept track of his activities. According to John, the final straw came in early 1979 when he was locked out of the house after attending a sports function in which his son was involved. Thereafter, John slept in the basement until he acquired a mobile home and moved into it on March 12, 1979. The court ordered the parties to see a marriage counselor. John attended once, and it is obvious that because of his attitude he was told not to come back.

At the trial John stated that he had tried for 6 years following 1973 to reconcile with his wife but that, due to Sharon's attitude and actions, no further efforts were likely to be fruitful. John further stated that he no longer could live with Sharon and that he believed their marriage to be irretrievably broken. Sharon is very active in her church and, following the teachings of her religion, does not believe in divorce. One of the sources of tension in the marriage apparently

was Sharon's strict religious position against artificial birth control. Sharon testified that she did not believe the marriage was irretrievably broken and she said that she and the children would welcome John back into the family home.

On review in this court, the factual determinations of the trial court are entitled to considerable deference. "While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite. Patton v. Patton, 203 Neb. 638, 279 N.W.2d 267 (1979). Obviously a trial court weighs the credibility of the witnesses and the evidence and determines what evidence should be given the greater weight in arriving at a factual determination on the merits. The testimony need not be accepted in its entirety and the trier of fact must use a commonsense approach and apply that common knowledge which is understood in the community." *Boroff v. Boroff*, 204 Neb. 217, 218-19, 281 N.W.2d 760, 761-62 (1979).

The trial court found that the marriage was irretrievably broken, relying heavily upon the failure of some 6 years of reconciliation efforts. It is true, as noted above, that the parties disagreed on this question and that their testimony conflicted as to whether their marriage was irretrievably broken. Under the rule stated above, the trial court was entitled to decide which version of the facts to give the greater weight. Apparently the court decided that John's testimony was more credible under the circumstances. Seen in that light, the facts of the case fully justify the trial court's finding that the marriage was irretrievably broken, and that finding is affirmed.

With regard to the division of the marital estate, the trial court determined, based on the evidence, that the total assets owned by the parties at the time this action was commenced had a value of $961,672.92.

The majority of these assets consisted of farmland, wheat on hand or under loan, wheat sold but not paid for, and farm machinery. The court found that John was entitled to have set off to him $139,474.42 as gifts received from his mother. There were debts of $4,750. The parties therefore had disposable marital assets of $817,448.50.

John has built his dryland farming business into an efficient unit and has acquired the proper and necessary farm machinery to handle the large number of acres he owns and leases. The court, rather than destroy the efficiency of the farming unit and leave John without the wheat production required to pay a monetary award, granted Sharon $24,712, consisting of checking and savings accounts, automobiles, and household furnishings; $150,000 cash; and $15,000 per year for a period of 12 years, or a total of $354,712, which constitutes 43 percent of the marital property. The court also imposed upon John an initial child support obligation of $250 per month per child.

This court has consistently held that the rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable. *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980). Generally speaking, awards in cases of this kind vary from one-third to one-half the value of the property involved, depending upon the facts and circumstances of the particular case, *Ragains v. Ragains*, 204 Neb. 50, 281 N.W.2d 516 (1979), and particularly so where the marriage is of long duration and the parties are the parents of all the children involved, *Knigge v. Knigge*, 204 Neb. 421, 282 N.W.2d 581 (1979). This court is not inclined to disturb the division of property made by the trial court unless it

is patently unfair on the record. *Ritter v. Ritter*, 205 Neb. 668, 289 N.W.2d 526 (1980). As noted, the general rule in cases such as this is that property awards should range from one-third to one-half of the value of the property involved. In this case, Sharon received an award clearly within those guidelines. It cannot be said that such an award is patently unfair. Accordingly, we affirm the trial court's division of property.

Sharon's third assignment of error is that the trial court failed to award interest on the unpaid balance of the payments ordered.

John and Sharon's taxable income from 1975 through 1978 averaged $27,322. If the average of the annual depreciation for those years, $17,985, is added thereto, they had an average total available of $45,307. The trial court has awarded $15,000 to Sharon per year for 12 years, plus an initial sum of $1,000 per month child support which, we recognize, will decline as each child reaches majority. However, the first year from the aforementioned average, Sharon will receive $27,000. John will have an average of $18,307 with which to operate the farms and live on. Had the court awarded interest on the installment payments at 8 percent per annum, the first year's interest would have been $12,000 and could have created an intolerable burden on John. Furthermore, it is clear that the trial court has the inherent power, in adjusting the rights of the parties in a marriage dissolution proceeding, to provide that a money allowance payable in installments shall not draw interest until payment is due. *Nickel v. Nickel*, 201 Neb. 267, 267 N.W.2d 190 (1978). The trial court did not err in refusing to award interest on the unpaid installments.

Sharon next assigns as error the failure to award her one-half of the value of prepaid farming expenses. Although John farms a large number of acres, one-half of the tillable land is summer-fallowed each year, that is to say, it generally lies idle without a crop to be

harvested, but is prepared for the following year's crop. This requires an outlay of cash for tilling, seed, and planting in the fall of the year next preceding the harvest. At trial John testified that the prepaid expenses on the summer-fallowed land which had been planted were $50,000. Sharon claims that such prepaid expenses amount to an asset which could be included in the total marital property subject to division between the parties. It seems to us that prepaid expenses for preparing the land and for planting a crop which is some 6 to 7 months from harvest should not be considered an asset subject to division between the parties. The primary reason for that result in the circumstances presented by this case is the speculative nature of the expected return on such an expenditure. The trial court was correct in not considering the prepaid expenses as an asset to be divided.

With regard to the alleged errors in values placed on certain parcels of real estate and in the mathematical calculations of the trial court, we find that we must likewise reject this assignment of error. The claimed errors, if indeed such mistakes exist in the record, relate to values of various items and are not of such a serious nature as to render the decision of the trial court incorrect.

Sharon next claims that certain gifts from John's mother were gifts to the parties, and therefore the real value of the gifts, totaling $139,474.42 as found by the trial court, should not have been set off to John.

John has three brothers and three sisters and, in an effort to give each of the children an equal gift of either land or money, John's mother held a family meeting and each child decided whether he or she desired money or land at the value used for federal estate tax purposes in the estate of John's father. When the decision by each child had been made, John's mother would send a check for a specific amount to each of the children desiring land. That child

would in turn deposit the check and issue his or her own check back to the mother for that amount. In this manner the land was paid for through a series of annual gifts and the mother would have sufficient liquid funds to make cash gifts to the children desiring cash instead of land. When John had paid for the first farm from the gifts from his mother, the deed was made out at John's request to both Sharon and himself. Two other farm sites were acquired in this fashion but were deeded to John alone.

The trial court, in making its determination relating to the property division, was entitled to consider the fact that Sharon contributed nothing to the acquisition of these properties and that the source of the funds used to acquire the farms were gifts from John's mother. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. *Cozette v. Cozette*, 196 Neb. 780, 246 N.W.2d 473 (1976).

In this connection, Sharon also complains that certain U.S. Savings Bonds which John had acquired before marriage and then transferred after marriage into both of their names should not have been set off to him. The bonds were acquired with funds obtained from John's share of a mineral trust set up after the death of his father, under which each child had a one-seventh interest, as well as from direct gifts from his mother. At the time of his marriage, John had $33,000 in savings bonds, less $3,000-$4,000 used to purchase a pickup truck earlier in 1957 which was brought into the marriage. After marriage these bonds were used to build the family home, build a Quonset, and buy machinery. Sharon relies on our statement in *Andersen v. Andersen*, 204 Neb. 796, 798, 285 N.W.2d 692, 694 (1979): "It is apparent that gifts made to another party during the course of a long marriage such as this should appropriately be a part of the

entire marital estate . . . ." Sharon fails to recognize that the bonds placed into her name were cashed shortly after the marriage and the funds were used as previously indicated. Were the bonds still in existence, there would be some merit to her claim.

The record reflects that the trial court credited John with $58,224.42 as "other assets owned by John at time of marriage plus subsequent gifts made by mother." Sharon claims this should have been only $22,589.14. The record reflects that at marriage John had bonds totaling $29,000 to $30,000, that he brought $21,381 in other property into the marriage, and that at least $17,575 of the subsequent gifts of $30,593.12 made by his mother was used to purchase the land. In addition, the court did not give John any credit for his mineral interest, which has generated $49,655 since the marriage, but considered the one-seventh mineral interest valued at $10,000 as marital property for the purpose of valuing the marital estate, even though it directly resulted from the mineral trust created for John by his mother. We will not disturb the finding of the trial court.

The trial court in its findings and decree did not award alimony to Sharon and she has thereupon assigned error.

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under Neb. Rev. Stat. § 42-365 (Reissue 1978), as well as the former decisions of this court, is one of reasonableness. *Kosnopfl v. Kosnopfl*, 206 Neb. 524, 293 N.W.2d 854 (1980). The statute provides in part: "[T]he court may order payment of such alimony by one party to the other . . . as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party

to engage in gainful employment without interfering with the interests of any minor children in the custody of such party."

Further, in applying the statute, this court has said: "It is the general rule that a judgment of the District Court is supported by a presumption of correctness, and this court is not inclined to disturb the alimony award made by the trial court unless it is patently unfair on the record." *Cole v. Cole*, 208 Neb. 562, 565, 304 N.W.2d 398, 400 (1981); *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980). The record in this case reveals that Sharon has been awarded some $354,712, or 43 percent of the marital estate. In addition, she will currently receive $1,000 a month in child support. During the first year after the dissolution, she will receive $27,000 as a result of the decree. Presumably, she will also have at her disposal the sizable investment income potentially derivable from the $150,000 lump sum cash payment ordered as part of the property division. Upon this record, we cannot say that the refusal to award alimony was patently unfair. The trial court's decision in this regard is affirmed.

Sharon next assigns that the court erred in awarding inadequate child support because the court made no provision for an increase in child support as each of the children reaches his or her age of majority.

This assignment of error is not argued or discussed in appellant's brief. It has long been a rule in this state that errors assigned but not discussed will generally not be considered by this court on appeal. Neb. Ct. R. 8.a.2.(3) (Rev. 1977); *Countryside Mobile Homes of Lincoln, Inc. v. Schade*, 204 Neb. 209, 281 N.W.2d 756 (1979). Should there be a material change in the circumstances requiring a modification of the child support, provision therefor has been made by the Legislature. See Neb. Rev. Stat. § 42-364 (Reissue 1978).

Sharon's final assignment of error relates to the

fee the court allowed her attorneys. The trial of this case lasted approximately 1½ days, and Sharon and John and John's appraiser were the only witnesses. In addition, Sharon offered several exhibits. The court allowed Sharon $3,000 for attorney fees and the cost of her appraiser, who did not testify. There is no rule which requires a trial court to necessarily award attorney fees in accordance with the value of the services in a divorce case. The award of attorney fees is discretionary with the trial court and depends on a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Brown v. Brown*, 199 Neb. 394, 259 N.W.2d 24 (1977). We cannot say that the award of attorney fees in this case was either incorrect or an abuse of discretion.

The decree of the District Court is affirmed. Sharon is awarded the sum of $1,000 for the services of her attorney in this court.

AFFIRMED.

FIRST DATA RESOURCES, INC., A DELAWARE CORPORATION, APPELLEE, V. OMAHA STEAKS INTERNATIONAL, INC., A NEBRASKA CORPORATION, APPELLANT.

307 N.W.2d 790

Filed July 2, 1981. No. 43347.

1. **Contracts: Consideration.** While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration.
2. **Contracts.** In order for an agreement to be voidable by reason of economic duress, it must not only have been obtained by means of pressure brought to bear, but the resulting agreement must be unjust, unconscionable, or illegal.
3. **Pleadings.** An answer to a petition which fails to allege an essential ele-

ment of a claimed defense of economic duress or business coercion is subject to a demurrer.

4. **Contracts.** A party cannot maintain an action on a contract without a prior substantial compliance on its part.
5. **Contracts: Negligence.** A right to recover on a contract does not obtain when the party seeking to recover has performed its obligations in a negligent manner.
6. **Contracts: Substantial Performance.** A party to whom performance is owed should receive at least approximately what it bargained for.
7. **Contracts: Substantial Performance: Words and Phrases.** "Substantial performance" is a relative term and whether it exists or not is a question to be determined in each case with reference to the existing facts and circumstances.
8. **Pleadings: Evidence.** If an answer properly pleads a defense, it is error to prohibit a defendant from offering evidence in support thereof.
9. **Prejudgment Interest.** Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right.
10. ____. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded with directions.

Warren S. Zwieback and Thomas F. Flaherty of Zwieback, Brady & Kasher, P.C., for appellant.

Frank F. Pospishil and Harvey B. Cooper of Abrahams, Kaslow & Cassman for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

The plaintiff, First Data Resources, Inc. (FDR), is a computer data processing organization which furnished computer services to Omaha Steaks International, Inc. (OSI), an organization which sold and shipped gourmet meats to various customers. FDR brought this action in the District Court for Douglas County to recover for its services claimed to have been rendered under the terms of a written contract as amended. OSI in its answer claimed the invalidity of the contract amendment by

reason of economic duress. It also alleged the failure of the plaintiff to perform required services and deliver necessary materials in a careful, diligent, and workmanlike manner, and counterclaimed for damages claimed to have resulted from such breach of contract. At the close of the plaintiff's case, and before the defendant had offered any evidence, FDR demurred ore tenus and moved to direct a verdict in its favor. After OSI, with leave of the court, dismissed its counterclaim, the trial court sustained both the demurrer and the motion and entered judgment in favor of FDR for $82,913.75, including $7,146.21 in prejudgment interest. This action OSI assigns as error on appeal. We reverse and remand.

On December 19, 1975, the parties entered into a written agreement whereby FDR agreed to furnish certain services and materials to OSI for which the latter was to pay the sum of $1.24 per "receiver" entered into the OSI processing system. Also, OSI was to pay certain charges for what the contract referred to as "Additional Services." The term of the agreement was for a period of 1 year from and after February 1, 1976, "after which period this Agreement shall remain in effect until terminated by either First Data or OSI upon ninety days prior written notice." On April 18, 1977, FDR wrote a letter to OSI advising that the pricing of FDR's services was unsatisfactory "and in accordance with the terms of our existing data processing Agreement, please consider this our notice to terminate our Agreement effective July 31, 1977." The letter went on to state that FDR wanted to continue offering services to OSI, but only if it could make a reasonable profit on such transactions. Therefore, FDR stated, if the business relationship was to stay in existence, a new agreement would have to be executed which would be effective August 1, 1977. FDR sent an additional letter dated April 28, 1977, in which a new rate of $1.92 per receiver was suggested.

By letter dated May 19, 1977, from OSI to FDR, OSI

stated that it accepted the offer of $1.92 "under extreme economic duress." The letter went on to say: "First Data Resources management knows very well that Omaha Steaks International cannot arrange for replacement of this service under such short notice. . . . Therefore, we reluctantly accept your offer of 18 May 1977 according to the terms of your letter of 18 May [sic] 1977." A "First Amendment to Agreement for Data Processing Services," containing the new terms, was executed by the parties on June 8, 1977, to be effective August 1, 1977. At OSI's request, this agreement was terminated and OSI ceased giving FDR any of its regular data processing business in January of 1978, although there were some winddown services that continued for several months.

In its amended petition FDR alleged the execution of the two agreements previously mentioned and claimed performance on its part in accordance with the amended agreement, a request for payment of services rendered to OSI until the date of termination, and a refusal on the part of OSI to make payment in accordance with the invoices submitted. By its second amended answer and counterclaim, OSI admitted the execution of the agreements. However, it claimed that it executed the "First Amendment to Agreement . . . for the sole reason that Plaintiff would not live up to its obligation under the agreement dated December 19, 1975, in that Plaintiff knew by reason of the Plaintiff's intimate association with the Defendant that the Defendant could not replace the Plaintiff's services within the time during which the Plaintiff threatened to cease rendering such services and the Plaintiff further knew that without Plaintiff's services, Defendant could not conduct its business, but Plaintiff nevertheless threatened to terminate its services and thereby forced Defendant to execute the . . . Agreement . . . such that the . . . Agreement is not binding on Defendant." OSI further alleged that such actions on the part of FDR in obtaining the execution of such agreement constituted the use of eco-

nomic duress by FDR. OSI then claimed that FDR failed to perform its part of the agreement in a workmanlike manner in that it negligently and carelessly caused erroneous worksheets and shipping instructions and duplicate shipping labels to be issued to OSI, resulting in duplicate orders being filled by OSI at a cost to OSI of $28,000 and loss of OSI employees' time of $4,500. Finally, OSI incorporated all of the allegations of its answer into what it called a counterclaim and requested damages in the amount of $32,500.

In sustaining the demurrer ore tenus and the motion for a directed verdict, the trial court reasoned that once the defendant dismissed its counterclaim based upon FDR's alleged negligent performance of the terms of the agreement, OSI had abandoned that defense, leaving only the defense of economic coercion. In examining the defendant's amended answer the court decided as a matter of law that the factual allegations, including admissions of fact contained therein, did not fit our requirements to plead a case of economic duress or coercion. Therefore, because the plaintiff had made out a prima facie case and the defendant was left without any affirmative defense, the trial court reasoned that FDR was entitled to judgment as a matter of law.

Perhaps the leading and most definitive case on the subject of business compulsion or economic duress is *Carpenter Paper Co. v. Kearney Hub Pub. Co.*, 163 Neb. 145, 78 N.W.2d 80 (1956). This was a case in which the facts were strikingly similar to those of the instant case. The parties had entered into a contract in 1942 whereby the plaintiff was to furnish newsprint at a certain price. The contract was for 1 year, renewable from year to year unless canceled in writing by either party. In November of 1947 an agreement was entered into by the parties raising the price per ton for newsprint delivered. The suit spawning the appeal was for newsprint sold and delivered in March of 1954. The defendant insisted that it should only be charged on the 1942 contract basis, claiming that it had gone along with the 1947

change "only because he had no other choice since he had to have newsprint." *Id.* at 150, 78 N.W.2d at 83.

This court declared that the appellant was not under legal obligation to continue supplying newsprint at the price provided for in the original contract. We then stated: "'While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration.'" *Carpenter Paper Co.* at 150, 78 N.W.2d at 83. We then cited with approval *Newland v. Child*, 73 Idaho 530, 254 P.2d 1066 (1953), and declared that in order for an agreement to be voidable by reason of economic duress, it must not only have been obtained by means of pressure brought to bear, but the resulting agreement must be unjust, unconscionable, or illegal. We concluded by saying: "It [the plaintiff] only sought to handle it on a more profitable basis. This it had a perfect right to do if, in doing so, it did not make unjust demands upon appellee in view of all the circumstances then existing." *Carpenter Paper Co.* at 152, 78 N.W.2d at 84.

OSI seeks to avoid the rather obvious application of *Carpenter Paper Co.* to the facts of its own case by citing *McCubbin v. Buss*, 180 Neb. 624, 144 N.W.2d 175 (1966). There we stated: "If a person threatens to do what he has a legal right to do, his threat ordinarily does not constitute business coercion. This rule has been stated in a form which arguably implies that no threat is wrongful unless there would be an independent liability for the threatened act. [Citing *Carpenter* and others.] If the implication was made, the rule was overstated. An unjust and inequitable threat is wrongful, although the threatened act would not be a violation of duty in the sense of an independent actionable wrong in the law of crimes, torts, or contracts." *Id.* at 628, 144 N.W.2d at 178. Two comments would seem to deny OSI's reliance upon *McCubbin.* The threat involved was to fire the plaintiff if he did not sign an agreement rescinding a stock-purchase contract which he possessed. As this court

pointed out, the plaintiff yielded his rights in order to preserve his means of livelihood, the defendant bargained from strength, and the consideration for the discharge of the stock-purchase contract was inadequate. Secondly, *McCubbin* did not overrule *Carpenter* in suggesting that to be wrongful a threat need not constitute the basis for an independent actionable wrong. It did not disturb the ruling of *Carpenter* that the agreement, supposedly the result of pressure, must be either illegal, *unjust*, or *unconscionable*.

FDR was perfectly within its rights in electing to terminate the agreement according to its terms rather than continue to do business on what it considered to be a losing basis. OSI in no way alleges in its answer that the amended agreement produced a contract the terms of which were either illegal, unjust, or unconscionable. Having failed to allege an essential element of the defense of economic duress or business coercion, the answer was subject to demurrer, and the trial court was correct in sustaining the demurrer ore tenus.

The next question to be decided is whether or not the trial court was correct in directing a verdict in favor of FDR, thereby depriving OSI of any opportunity to present evidence in support of its alleged defense. FDR insists that such action was correct because the defendant's pleaded defense of economic coercion was dismissed by the court and the counterclaim was dismissed by OSI. Therefore, according to FDR, the defendant's answer contained only a general denial which was insufficient to allow the production of evidence in behalf of OSI in the face of the judicial admissions made by its counsel. However, an examination of the record reveals something substantially less than an unequivocal admission on the part of OSI that FDR had fully performed its obligations.

After moving for a directed verdict in favor of OSI because there "has been no proof which would permit the jury to find in favor of the Plaintiff," the defendant's lawyer was asked by the court: "Is it . . . conceded . . . al-

though you haven't put on any evidence on the point, that the . . . remainder of the charges on the invoices showing the total as this last witness has testified to have, in fact, been shown by evidence." Counsel replied that "[t]he charges have been shown." The court then continued: "What then exactly is your point then with respect to the remainder. I want to make sure I understood that." Mr. Zwieback replied: "*That it has not been shown that the services were rendered* or that the charges were fair and reasonable, Judge. The charges are on the invoices." (Emphasis supplied.) The court then asked: "I understand that the charges are in reference — relate to the agreement, the validity of which you contest. However, it is your point, just so I get this clear in my mind, the services which those charges represent have in fact been rendered." Mr. Zwieback replied: "*That is one of the points.* We are not talking about the twenty-four hundred" (emphasis supplied), to which the court replied: "No, that is separate," and counsel responded, "Okay, that is correct." As a matter of fact, it seems rather clear to us that defendant's counsel did deny that the services required by the contract were performed, both on the record and in the answer. Plaintiff cites *Midland-Ross Corp. v. Swartz*, 185 Neb. 484, 176 N.W.2d 735 (1970), for the proposition that following the establishment of a prima facie case by the plaintiff, the court should not permit the defendant to introduce evidence where the answer does not state a defense, but rather should direct a verdict for the plaintiff. It should not require the citation of authority to establish the converse of that rule, i.e., that if the answer does plead a defense it would be error to prohibit the defendant from offering evidence in support thereof. Nonperformance can be proved under a general denial. For that reason, the defendant should have been given the opportunity to present its evidence tending to establish nonperformance on the part of the plaintiff. For that reason, the judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with

this opinion.

Because there is still a possibility of a judgment in favor of the plaintiff upon a retrial of this case, we should mention the error claimed by the defendant because of the awarding of prejudgment interest. This is clearly answered by *Abbott v. Abbott*, 188 Neb. 61, 195 N.W.2d 204 (1972). "Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. 'A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.'" *Id.* at 67, 195 N.W.2d at 209. The trial court applied the correct rule.

REVERSED AND REMANDED WITH DIRECTIONS.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 763, AFL-CIO, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, APPELLEE.

307 N.W. 2d 795

Filed July 2, 1981. No. 43367.

1. **Commission of Industrial Relations: Jurisdiction.** The Commission of Industrial Relations, as an administrative body, has no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the plain purpose of the act.
2. ____: ____. Under the provisions of Neb. Rev. Stat. § 48-819 (Cum. Supp. 1980), the Commission of Industrial Relations has no authority to enforce its own orders, such orders only being enforceable in an appropriate proceeding in courts of this state.
3. **Commission of Industrial Relations: Contracts.** An order of the Commission of Industrial Relations constitutes a contract between the parties, enforceable as any other contract entered into by the parties.
4. **Commission of Industrial Relations: Prejudgment Interest.** An order of the Commission of Industrial Relations, once sued upon, may bear prejudgment interest, just as certain other contracts sued upon may bear prejudgment interest; however, such fact does not authorize the Com-

mission of Industrial Relations to order the payment of interest as a part of its order. Such authority lies solely with an appropriate court and comes into effect only when entered by that appropriate court, in the same manner to which any other suit upon a contract would be subject to the payment of prejudgment interest if and when ordered by an appropriate court.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

M. H. Weinberg of Weinberg & Weinberg, P.C., for appellant.

Hird Stryker of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, International Brotherhood of Electrical Workers Local 763, AFL-CIO (IBEW), appeals from an order entered by the District Court for Douglas County, Nebraska, sustaining a demurrer filed by the appellee, Omaha Public Power District (OPPD). The demurrer was filed in response to an amended petition filed by IBEW seeking declaratory relief pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1979). IBEW elected to stand on its amended petition and not plead further, and accordingly the District Court dismissed the action filed by IBEW. We affirm the judgment of the trial court in all respects.

IBEW was, at all times relevant to this action, the exclusive bargaining agent for the employees of OPPD. In 1978 an industrial dispute arose between the parties when they were unable to reach agreement on a new labor contract by the time the existing contract expired on May 31, 1978. The dispute was taken to the Commission of Industrial Relations (CIR) and was docketed there as case No. 270. Following a hearing before the CIR, the CIR entered an order dated No-

vember 28, 1978, purporting to resolve the dispute by making certain findings concerning wages, terms, and conditions of employment. Following the entry of the CIR's order on November 28, 1978, the parties worked together in an attempt to extrapolate wage rates from the wage determinations made by the CIR in its order. A supplemental order was entered by the CIR in case No. 270 on February 28, 1979. The purpose of that order was to resolve remaining disagreements over wage rates for one group of OPPD employees. Following this final order, neither party appealed case No. 270, and its order purportedly became final.

Notwithstanding the fact that a final order was entered by the CIR, the parties continued to dispute certain portions of the final order. On August 13, 1979, IBEW filed a document with the CIR, designated by IBEW as a "request for implementation and clarification of opinion and order." The CIR docketed the matter as a new action, assigning to it case No. 316. The principal purpose of the request filed by IBEW was to seek implementation of an apprenticeship program apparently required under the earlier CIR order in case No. 270, and for the further purpose of seeking an order from the CIR requiring OPPD to pay 8 percent interest on the CIR wage order entered in case No. 270 on November 28, 1978.

On November 7, 1979, the CIR entered an order in which it found that the rates of pay set forth in its earlier order of November 28, 1978, were first paid on paychecks dated May 4, 1979, covering the period April 21, 1979, to May 4, 1979. The payment for the period June 1, 1978, to April 21, 1979, was made May 18, 1979. No interest was added to the checks. In its order entered November 7, 1979, the CIR made some general reference to the matter of interest, writing in part: "Under the provisions of § 48-819, R.R.S. 1943, orders of this Commission have the same force and effect as like orders of the District Court. Section

45-103, R.R.S. 1943 provides that judgments of the District Court draw interest at 8% per annum. The statutory language is conclusive, and we conclude that our orders draw interest at the statutory rate.

"The Order of November 28, 1978 in Case No. 270, not having been appealed, is not subject to collateral attack. [Citations omitted.]

"We need not consider respondent's defenses, since they may be raised either by motion to quash or by separate action for injunction should petitioner decide to pursue the matter by transcript and execution under the first sentence of § 48-819, R.R.S. 1943.

"ORDERED, that the dispute herein is resolved as set forth above."

While the clear implication of the order entered by the CIR on November 7, 1979, in case No. 316, is that it found that interest should be paid by OPPD on the salaries due and owing, it does not so order the same to be done. Moreover, a reading of the order in case No. 316 makes it unclear as to whether the allegedly ordered interest is to run from November 28, 1978, when the CIR's order was first entered, or from the date of its supplemental order on February 28, 1979, or part from November 28, 1978, and part from February 28, 1979. The answer to that question obviously would depend upon the introduction of evidence as to what the facts of the matter were, even if the CIR had authority to order the payment of interest.

Following the entry of the order by the CIR in case No. 316 on November 7, 1979, IBEW filed an action in the District Court for Douglas County, Nebraska, on February 1, 1980, seeking declaratory relief. OPPD filed a demurrer which was thereafter sustained by the trial court.

IBEW then filed an amended petition in which it alleged the historical facts concerning the dispute in both case Nos. 270 and 316. It further alleged that: "On November 7, 1979, an Opinion and Order of the Commission of Industrial Relations was entered find-

ing in favor of the Petitioner [IBEW] that 8% interest was due and owing on the Order of November 28, 1978 in Case No. 270 and directing the Petitioner to seek enforcement in the District Court." A reading of the order of the CIR fails to disclose either a specific finding that interest was due on its order of November 28, 1978, or directing IBEW to seek enforcement. The only other allegation which begins to even approach an allegation of fact from which any controversy could be gleaned is paragraph 15 of IBEW's amended petition wherein it is alleged: "That on or about January 15, 1980, the Respondent refused to comply with the Order of the Commission of Industrial Relations entered in Case No. 316 on December 19, 1979 [sic]." As indicated earlier, a reading of the order entered by the CIR in case No. 316 fails to disclose what it is that the CIR did in fact order, other than to appear to make a declaration that interest is due on its orders from the date of their entry.

The trial court did not give any reason for its sustaining of the demurrer. We must therefore attempt to determine if there is no basis upon which the demurrer could have been sustained. Our examination of the transcript presented to us, which is the only matter presented to the court for review, discloses that indeed the amended petition failed to state facts sufficient to constitute a cause of action and thereby made it subject to a demurrer.

IBEW's argument appears to be that because the order of the CIR is declared by statute to be identical to an order of the District Court, interest is due from the date that the order of the CIR is entered. See Neb. Rev. Stat. § 48-819 (Cum. Supp. 1980).

Section 48-819, however, must be read in light of what this court has heretofore said concerning both the jurisdiction of the CIR and the effects of its orders. In *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979), we held that the CIR's powers are limited to those provided for in Neb.

Rev. Stat. § 48-818 (Cum. Supp. 1980). And recently, in *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 30, 286 N.W.2d 102, 105 (1979), we held that the CIR, as an administrative body, "has no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the plain purpose of the act." We further held in *Transport Workers of America v. Transit Auth. of City of Omaha, supra*: "The authority of the Commission of Industrial Relations is carefully circumscribed. Its procedures are prescribed by statute. Its jurisdiction is clearly defined and is limited to what are clearly legislative concerns." *Id.* at 30-31, 286 N.W.2d at 105.

"That the authority of the CIR is limited to disputes between a public employer and a public employee absent an agreement is made even clearer when we examine the provisions of sections 48-818 and 48-819, R.R.S. 1943. Section 48-818 specifically limits the findings and orders of the CIR to establishing or altering 'the scale of wages, hours of labor, or conditions of employment, or any one or more of the same.' Specifically, section 48-818 provides: 'In making such findings and order or orders the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions.' . . .

"Likewise, under the provisions of section 48-819, R.R.S. 1943, the CIR has no authority to enforce its own orders, such orders only being enforceable in an appropriate proceeding in courts of this state." *Id.* at 32-33, 286 N.W.2d at 106.

The language of § 48-819 to the effect that orders of the CIR are binding on all parties and are deemed to be of the same force and effect as like orders entered by a District Court does not mean that orders entered by the

CIR are orders entered by the District Court. Rather, the language of the statute means that once an order is entered by the CIR, the rights of the parties are established and a suit need not be brought in the District Court to establish the rights of the parties. On the other hand, however, the language of § 48-819 makes it clear that a suit to enforce the rights and obligations of the parties must, indeed, be brought in the District Court, and an order of the CIR is not enforceable as a matter of right without the aid of the District Court as if the mere entry of the order by the CIR made it an order of the District Court for all legal purposes. Unless and until a District Court does in fact enter an order of enforcement, the order of the CIR constitutes a contract between the parties, enforceable as any other contract entered into by the parties.

While it may very well be true that an order of the CIR, once sued upon, may bear prejudgment interest, just as certain other contracts sued upon may bear prejudgment interest (see, *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977); *Frank McGill, Inc. v. Nucor Corp.*, 195 Neb. 448, 238 N.W.2d 894 (1976); *Mid States Engineering v. Rohde*, 182 Neb. 590, 156 N.W.2d 149 (1968)), such fact does not authorize the CIR to order the payment of interest as a part of its order. Such authority lies solely with an appropriate court and comes into effect only when entered by that appropriate court, in the same manner to which any other suit upon a contract would be subject to the payment of prejudgment interest if and when ordered by an appropriate court.

The recitation of fact by the CIR in its order of November 7, 1979, that orders of the CIR are to be treated in the same manner as judgments of a District Court could not and did not subject the "contract" created by the CIR for IBEW and OPPD on November 28, 1978, to the payment of interest at that time.

Moreover, an allegation by IBEW in its amended petition seeking declaratory relief to the effect that "on

or about January 15, 1980, the Respondent refused to comply with the Order of the Commission of Industrial Relations entered in Case No. 316 on December 19, 1979 [sic]," likewise failed to allege facts sufficient to constitute a cause of action, both by reason of the fact that the allegation was a mere conclusion and not an allegation of fact and by reason of the fact that the CIR's order purporting to require OPPD to pay interest at that time was beyond the authority of the CIR as presently prescribed by the applicable statutes. Having failed to allege facts upon which declaratory relief could be granted, the trial court was correct in sustaining the demurrer of OPPD.

The instant case once more points up the difficulty of attempting to operate under the current statutory provisions for resolving public employer-public employee disputes. Each case coming to this court makes those deficiencies even more apparent. Courts, however, are not designed to fill statutory gaps and should not seek to replace the legislative branch of government. The arguments made by counsel for IBEW before this court in this case are more properly for the Legislature, which should be determining how the deficiencies in the act could best be cured. The fact, however, that there are deficiencies which should be corrected is not sufficient to either state a cause of action or to entitle the parties to declaratory relief. The judgment of the trial court in sustaining the demurrer and dismissing the petition of IBEW is affirmed.

AFFIRMED.

CLINTON and BRODKEY, JJ., concur in result.

BOSLAUGH, J., dissenting.

I am unable to join the opinion of the court because I believe it to be in error in several important respects.

The operative facts in this case, which are set out in the plaintiff's amended petition, are quite simple. The plaintiff is the bargaining agent for employees of the defendant. A labor dispute existed between the defend-

ant and its employees. A proceeding before the Commission of Industrial Relations resulted in an order fixing the wages for the defendant's employees for the period in dispute. A later order of the commission modified the first order. Neither party appealed from either order of the commission.

A dispute arose between the parties concerning the validity of the two orders of the commission. The plaintiff commenced this action to determine whether the orders were valid. The District Court sustained a demurrer to the petition, dismissed the petition, and this court affirmed. Our opinion, however, proceeds *to declare* the rights of the parties in regard to the interest provision in the commission's order. Thus, although holding that the plaintiff has no right to declaratory relief, this court grants declaratory relief.

The order fixing wages was effective in 1978. The defendant did not comply with the order until 1979. The amount due each employee for wages at the new rate was a debt which was liquidated and on which each employee could have recovered prejudgment interest in an action for the balance due. Whether this was a matter that properly should have been before the commission, the fact remains that the commission had jurisdiction of the parties, the matter related to wages in dispute, and no appeal was taken from the order. In the interest of judicial efficiency and practical resolution of minor disputes of this nature, I believe the better rule would be to hold that the parties were bound by the order of the commission.

Many of the difficulties referred to in the opinion of the court would be eliminated if this court would follow its earlier decisions. In *School Dist. of Seward Education Assn. v. School Dist. of Seward*, 188 Neb. 772, 778-79, 199 N.W.2d 752, 756-57 (1972), we said: "Article XV, section 9, Constitution of Nebraska, obviously was intended to be an exception to Article II of the Constitution. The language of the amendment, 'Laws may be enacted providing for the investigation, submission

and determination of controversies,' coupled with the designation 'An Industrial Commission,' indicates a commission with administrative powers. The last sentence providing for appeals from its *final orders* and *judgments* means a commission with some judicial powers to determine controversies. The report of the joint committee that it was authorizing a commission with combined administrative, legislative, and judicial powers clearly indicates the type of commission or agency the Constitutional Convention was authorizing. In this respect, it is in the same category as Article IV, section 20, which created the Railway Commission. We have heretofore held that the Railway Commission has legislative, executive, and judicial powers as an exception to Article II. See, In re Lincoln Traction Co. (1919), 103 Neb. 229, 171 N.W. 192; Swanson v. Sorensen (1967), 181 Neb. 312, 148 N.W.2d 197. The same is true with the Court of Industrial Relations. In adopting the constitutional provision authorizing an Industrial Commission, it was made an independent part of the Constitution of Nebraska, and not as an amendment to Article II."

It is irrelevant to say that the Legislature could have established the commission independently of constitutional authorization. The fact is the commission was established pursuant to the enabling provision in the Constitution. Neb. Rev. Stat. §§ 48-802, 48-803 (Reissue 1978). Although the jurisdiction of the commission is necessarily limited to resolving matters related to labor disputes, I believe the better rule is that the commission exercises all three functions of government in resolving the disputes within that area which are brought before it.

McCOWN, J., joins in this dissent.

JANET F. LEE, SPECIAL ADMINISTRATRIX OF THE ESTATE OF DUANE LEE, DECEASED, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

307 N.W.2d 800

Filed July 2, 1981. No. 43385.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In a proceeding brought under the Political Subdivisions Tort Claims Act, the findings of fact by the trial court will not be overturned unless clearly wrong.
2. **Emergency Vehicles.** The driver of an emergency vehicle has a duty not to drive in reckless disregard for the safety of others.
3. ——. The provisions of Neb. Rev. Stat. § 39-608 (Reissue 1978) shall not relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect such driver from the consequences of his reckless disregard for the safety of others.
4. ——. A police officer pursuing a traffic violator is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances.
5. **Judgments: Evidence.** In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party, every controverted fact must be resolved in his or her favor, and he or she is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Paul E. Watts, Gerald E. Moran, Mark S. Trustin, and Larry R. Taylor of Watts & Moran for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Patrick W. Kennison for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

Appellant, Janet F. Lee, administratrix of the estate of Duane Lee, appeals from a judgment of the District Court for Douglas County, Nebraska, in favor of the City of Omaha in this wrongful death action. Appellant's decedent was killed on May 23, 1976, when the

automobile he was driving was struck by a van driven by Terry L. Recek at the intersection of 20th and J Streets in Omaha, Nebraska. Recek at the time was being pursued at high speeds by officers of the Omaha Police Department. On May 16, 1977, appellant filed a claim against the City of Omaha pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977). The claim was denied by the city on October 24, 1977. On March 23, 1978, appellant withdrew her claim and subsequently filed this action against the City of Omaha and Officers Michael A. O'Keefe, R. Scott Hillabrand, and Howard J. Lawler, alleging that negligence in conducting and in failing to break off the chase before Recek's vehicle collided with Mr. Lee's vehicle was the proximate cause of Mr. Lee's death. After a bench trial on the merits, the District Court found that the officers were guilty of no negligence and entered judgment for the appellee. Appellant assigns this finding as error on appeal. We affirm.

The high-speed chase here involved began at approximately 8:40 p.m. on May 23, 1976, when Officers Hillabrand and Lawler, who were on their dinner break at a fast-food restaurant on 24th between F and G Streets in South Omaha, observed a blue and white van with license plates 59 Comm. 294 which was parked next door at a bar and package liquor store. Officer Hillabrand had last seen those plates on a different van belonging to Terry Recek whose operator's license had been impounded for 30 days by Omaha Municipal Court Judge Cropper on April 29, 1976. The officers then observed a person leave the liquor store and enter the van through the passenger door. Although there is some dispute on the point, the evidence shows that Officer Hillabrand, while still in the restaurant, radioed to Officer O'Keefe to come to the location and "check" this van for "a party" driving on a suspended license. Officer O'Keefe testified that when he received the call from Hillabrand, the name Terry Recek "popped right in my

head" and he proceeded toward the area. In the interim, Hillabrand and Lawler had returned to their patrol car and began following the van after its driver left the liquor store, first going south on 24th Street and then turning west on G Street. On 25th between F and G Streets, the officers used the public address unit in their vehicle to request that Recek pull over and stop, and at that point Recek increased his speed. The officers began pursuing Recek and pursued him back and forth across an approximately 10-block area of South Omaha.

When the chase reached 24th and E Streets, Officer O'Keefe appeared on the scene. He testified that he positively identified the driver of the fleeing van as Recek at that time. For the duration of the chase, all the vehicles involved ignored stops signs and traffic signals, although the officers testified that they slowed at all intersections, drove the wrong way on at least one one-way street, and exceeded the posted speed limit of 35 miles per hour by at least 10 miles per hour, and more at times. In addition, Officer O'Keefe collided with a legally parked vehicle as he left an alley in the course of the chase, and the evidence indicates that there was a near collision at the intersection of 24th and I Streets involving both police vehicles and another vehicle proceeding lawfully at that intersection. Both police vehicles used their sirens and flashing red lights at all times during the chase and continually broadcast the progress of the chase to the central dispatcher at police headquarters, as was standard procedure. Hillabrand and O'Keefe testified that it did not occur to them to cease pursuit, although each testified that they had formed the opinion that Recek would not stop even if the chase continued. After the officers pursued Recek for approximately 7 minutes, Recek ran a stop sign at the intersection of 20th and J Streets and struck the Lee vehicle which was being driven through the intersection. Mr. Lee was killed immediately. Following the collision, Recek fled on foot for a short distance until police caught him. Recek subsequently pled guilty to a

charge of motor vehicle homicide and was sentenced to 1 to 2 years in prison.

Prior to May 23, 1976, Recek had been involved in several incidents with Omaha police in South Omaha, from which it can be concluded that he had a propensity to run from the police. Two weeks prior to this chase Hillabrand and Lawler had engaged in another chase with Recek in the area, but he escaped them after a few blocks. In February 1976 O'Keefe had chased Recek for a distance of 4 or 5 blocks. That chase had resulted in Recek's arrest for a moving violation, disorderly conduct, and improper display of plates. There was additional evidence of other encounters between Omaha police and Recek which indicated a propensity on Recek's part to bait police and then engage them in a chase.

On appeal, appellant contends that, armed with this knowledge of Recek's encounters with police in the past, it was negligence for the police officers to begin the chase since, at the time Hillabrand and Lawler began the chase, Recek was committing no moving violations and it would have been a simple matter for them to later cite him for driving while his operator's license was impounded. Appellant further contends that after Officer O'Keefe positively identified the driver of the fleeing van as Recek, it was negligence on the part of the police to continue the chase since all officers had independently concluded that Recek would not stop. However, the trial court found as a fact that the officers were not negligent, either in beginning or continuing the chase; and in a proceeding brought under the Political Subdivisions Tort Claims Act, the findings of fact by the trial court will not be overturned unless clearly wrong. *Lindgren v. City of Gering*, 206 Neb. 360, 292 N.W.2d 921 (1980). Since the record does not permit us to hold that the finding of no negligence was clearly wrong, we must affirm.

There is no doubt that in Nebraska, and in other jurisdictions as well, the duty of law enforcement officers

to apprehend violators of the law must be balanced with a duty of care to the general public as well. As we stated in *Hammon v. Pedigo*, 173 Neb. 787, 796, 115 N.W.2d 222, 227 (1962): "[A] duty is imposed upon [the] driver [of an emergency vehicle] to operate the emergency vehicle in such a manner that he will not do so in reckless disregard to the safety of others." This duty in Nebraska is imposed by statute. Neb. Rev. Stat. § 39-608 (Reissue 1978) sets out a number of traffic privileges exercisable by emergency vehicles "when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law . . . ." However, subsection (5) of the statute states: "The provisions of this section shall not relieve the driver of such emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect such driver from the consequences of his reckless disregard for the safety of others." Appellee itself has recognized this duty by stating in its standard operating procedure manual: "At no time shall emergency driving conditions necessitate any unsafe driving practices. All speed shall be reasonable and proper.

. . . .

"All pursuits shall be terminated when the risks outweigh the desirability of apprehension.

. . . .

". . . *Driving of the police vehicle under all levels of operation . . . does not exempt the driver from the consequence of reckless disregard for the safety of others.*" Therefore, appellant is correct in her contention that the police owed a duty of due care under the circumstances to persons in the class of persons which included the decedent.

As stated in *Hammon v. Pedigo, supra* at 799, 115 N.W.2d at 228, a police officer pursuing a traffic violator "is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances."

The question then becomes whether or not that duty

to appellant's decedent was breached by the officers in this case. The weight of authority holds that this is a question to be decided by the finder of fact. In an action brought under the Political Subdivisions Tort Claims Act, §§ 23-2401 et seq., the factfinding task belongs to the trial court, § 23-2406, and the findings of a District Court in proceedings under the act will not be disturbed on appeal unless they are clearly wrong. *Lindgren v. City of Gering, supra.*

In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Daniels v. Andersen,* 195 Neb. 95, 237 N.W.2d 397 (1975). Viewed by this standard, we cannot say that the record discloses that the findings of the trial court in this case were *clearly* wrong.

It is, of course, tragic that an innocent third party lost his life as the result of a police chase of an offender who, at the time the chase began, was committing no moving traffic violations and whose only offense at the time he was observed by police was driving while his operator's license was under impoundment. However, the trial court could have believed, from the record, that at the time Officers Hillabrand and Lawler observed the van at the liquor store just prior to the chase, they had not positively identified the driver as Mr. Recek, and, thus, were not certain that the driver would engage them in a chase when they attempted to stop him. By the time Officer O'Keefe joined in the pursuit and positively identified Recek, Recek was then committing or had immediately before committed numerous moving violations. The trial court could have inferred, from the record, that given the light traffic conditions in the area at that time on a Sunday evening, the desirability of apprehension of Recek outweighed the risk of pursuit and that all the officers involved had so concluded. It is

undisputed that both patrol cars used their sirens and revolving red lights during the entire pursuit; and from the testimony, the trial court could have believed that the police vehicles slowed at all intersections and that their speeds were reasonable and proper under the circumstances. It must be remembered that foresight, not hindsight, is the standard by which negligence is determined, and that even an action which in retrospect turns out to have been ill-advised may still have been reasonable under all the circumstances.

Under the standard of review applicable to actions of this kind, we hold that the trial court's findings, on this record, are not clearly wrong and affirm the judgment of the District Court in favor of the appellee.

AFFIRMED.

DIX LATHROP, APPELLANT, V. JAMES MCBRIDE, APPELLEE.

307 N.W.2d 804

Filed July 2, 1981. No. 43410.

1. **Libel and Slander: Limitations of Actions.** An action for slander must be brought within 1 year from the date the cause of action accrues.
2. ____: ____. An action for slander accrues at the time of publication.
3. ____: ____. A slander is published when the words are spoken and understood by a third person to pertain to the person slandered.
4. ____: ____. Ignorance of the publication or of the evidence probative of the plaintiff's claim does not postpone the operation of the statute of limitations.

Appeal from the District Court for Hamilton County: WILLIAM H. NORTON, Judge. Affirmed.

Noren & Burns for appellant.

Whitney, Newman & Mersch and Baylor, Evnen, Curtiss, Grimit & Witt for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY,

JJ., and BURKHARD and WOLF, District Judges.

CLINTON, J.

This is an action by the plaintiff Lathrop against the defendant McBride for damages allegedly caused by defamatory oral statements claimed to have been made by McBride about the plaintiff on or about August 18, 1977.

The plaintiff's petition was filed on March 9, 1979. It alleged that on June 6, 1977, the defendant was one of the five members of the Board of Educational Lands and Funds of the State of Nebraska; that about that date the plaintiff submitted to the board an application for employment as "fieldman-appraiser" to be located at Ogallala, Nebraska; that on August 18, 1977, the plaintiff was interviewed by the board for the position for which he had applied; and that by letter dated August 24, 1977, he was notified that the position was not offered to him. It further alleged that on August 29, 1977, the plaintiff traveled to the residence of the chairman of the board and made inquiry of him as to why he had not been hired. He was then told by the chairman that the *defendant McBride* "had told him (Mr. Allington) and the other board members that defendant had obtained and received information of a derogatory nature from a former employer of the plaintiff, the Farmers Home Administration, and for this reason plaintiff had not been hired for said position by said board." It alleged that he was unable to obtain from the chairman either "the specific source or the specific contents of said derogatory information allegedly received by defendant from the Farmers Home Administration."

A large part of the petition is given to allegations of the various efforts of the plaintiff, continuing from August 30, 1977, until September 13, 1978, to secure the above items of information. It then alleges that on the latter date the plaintiff discovered that the source of the information was one Dwight Theobald,

his supervisor while employed by the Farmers Home Administration, and that the nature of the derogatory information was the plaintiff's alleged inability to get along with and communicate with people, and his inability to take supervision and to deal with the public. It then alleged that the statements made by the defendant were false; that they were made with actual malice and reckless disregard for the truth; and that, as a proximate result of the slander, the plaintiff did not obtain the job for which he had applied and for which he was qualified and would otherwise have received.

The defendant's amended answer alleged, among other defenses, that statements made by the defendant were true, that they were privileged, and that the cause of action was barred by the statute of limitations.

The reply of the plaintiff alleged "that Defendant and others did everything possible to conceal the source and contents of the defamatory statement, and that Plaintiff did not know or become aware of the material facts necessary for the accrual of this cause of action until September 13, 1978."

The defendant filed a motion for summary judgment, and at the hearing thereon there was received the depositions of Mr. Theobald and both of the parties to this action, as well as certain affidavits. Also offered by the plaintiff, but refused by the court, were proceedings of a hearing before the Department of Labor in which the Board of Educational Lands and Funds was defendant, based upon the plaintiff's claim that he was denied the position in question because of the refusal to grant him a veteran's preference as required by law.

The trial court granted the motion for summary judgment on the ground that the cause was barred by the statute of limitations.

The plaintiff appeals to this court and makes the following assignments of error: (1) The trial court erred in refusing to receive exhibits 4 and 4a and

exhibit 3, all of which are or pertain to the proceedings before the Commissioner of Labor; (2) The trial court erred in holding the cause was barred by the statute of limitations; and (3) The court erred in granting the motion for summary judgment because there were material questions of disputed fact.

We affirm on the grounds that the undisputed facts show that the cause of action is barred by the statute of limitations. Neb. Rev. Stat. § 25-208 (Reissue 1979).

Section 25-208 provides that actions for libel, slander, and certain other causes of action must be brought within 1 year. This court and, as far as we have been able to ascertain, all other courts have held that a cause of action for slander or libel accrues on the date of publication of the defamatory matter. *Patterson v. Renstrom*, 188 Neb. 78, 195 N.W.2d 193 (1972); *Tennyson v. Werthman*, 167 Neb. 208, 92 N.W.2d 559 (1958); *Reller v. Ankeny*, 160 Neb. 47, 68 N.W.2d 686 (1955). In the case of slander, the publication takes place when the words are spoken and understood by a third person to pertain to the person slandered. 53 C.J.S. *Libel and Slander* § 82 (1948). Ignorance of the publication or of the evidence probative of the plaintiff's claim does not postpone the operation of the statute. *Patterson v. Renstrom, supra; Grist v. The Upjohn Company*, 1 Mich. App. 72, 134 N.W.2d 358 (1965); *Brown v. Chicago, Rock Island & Pacific Railroad Co.*, 323 F.2d 420 (8th Cir. 1963); *Hartman v. Time*, 64 F. Supp. 671 (E.D. Pa. 1946). Although there are exceptions, the above is the general rule applying to many types of causes of action. *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

The plaintiff, in his brief, argues that there is evidence in the record which tends to show the defendant fraudulently concealed facts necessary to the "accrual" of the cause of action for slander and that the statute did not begin to run until he discovered

those facts on September 13, 1978. He relies upon *Rucker v. Ward*, 131 Neb. 25, 267 N.W. 191 (1936), and a dictum in *Patterson v. Renstrom, supra.* In *Patterson* we said at 80, 195 N.W.2d at 194: "Here there is no allegation of fraud or fraudulent concealment. By analogy the statute of limitations under section 4 of the Clayton Act involves related issues. Under that statute mere ignorance of the facts constituting a cause of action, in the absence of the defendant's fraud, and mere ignorance of the evidence which would be probative of the plaintiff's claim, will not suffice to postpone the operation of the statute of limitations." In *Rucker* (described as an action for fraud) the fourth syllabus was: "'One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statutes of limitation as a defense.' *Liberty Nat. Bank v. Lewis*, 172 Okla. 103, 44 Pac. (2) 127."

The statement in *Rucker* is limited to wrongful concealment of a material fact necessary to the *accrual* of the cause of action. In that case the plaintiff was to be paid a certain sum of money by the defendant when the latter received it from a third party. The defendant, over a period of time, upon inquiry by the plaintiff, kept informing him that the money had not been received, when, in fact, it had been. In *Patterson* (although the question was not involved) we intimated that the statute of limitations on a cause for libel might not begin to run if there was a fraudulent concealment. The context in which that statement was made and the facts of that case indicate that we were referring to fraudulent concealment of the fact of the libel. As previously stated, in that case we said at 80, 195 N.W.2d at 194: "[M]ere ignorance of the evidence which would be probative of the plaintiff's claim, will not suffice to postpone the operation of the statute of limitations." Neither of the

principles on which the plaintiff relies is applicable here. In *Rucker* the defendant concealed the fact that the money had been received, i.e., that the cause had accrued. The statement in *Patterson*, upon which the plaintiff relies, is dictum and in any event not applicable to the facts before us.

In this case the record shows without any dispute that 11 days after the alleged publication the plaintiff knew that derogatory statements had been made about him, that the defendant was the one who had made them, and that was the stated reason he did not get the employment. He then knew that a cause of action had accrued. An action could then have been filed and discovery used to procure the evidential details. The record does not show, nor did the plaintiff plead in his reply, any fraudulent concealment. The record merely shows at most that the defendant and the board chairman refused to tell him what had been said or to disclose the source. This case comes within the principle that "mere ignorance of the evidence which would be probative of the plaintiff's claim" is not sufficient to toll the operation of the statute of limitations.

The trial court was correct in its ruling that the cause was barred by the statute of limitations. This makes it unnecessary to discuss the other assignments made by the plaintiff or to discuss the various other defenses raised by the defendant.

AFFIRMED.

JANEANE STANEK, APPELLEE, V. EDWARD JOHN SWIERCZEK AND MESSER'S AUTO BODY SUPPLY, INC., APPELLANTS.

307 N.W.2d 807

Filed July 2, 1981. No. 43414.

1. **Motor Vehicles: Negligence.** The sudden emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it.
2. ____: ____. It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead, and the rule applies to driving in the daytime when vision is obstructed by physical conditions.
3. **Negligence: Damages.** It is a fundamental principle of the law of damages that a person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of medical care and expense incurred for the treatment of the injuries to the time of trial, as well as the cost of those reasonably certain to be incurred in the future.
4. **Damages: Insurance.** The cost of a general health policy may not be substituted for proof of past and future medical expenses.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded.

Thomas A. Gleason of Boland, Mullin & Walsh for appellants.

Daniel G. Dolan of Dolan, Dinsmore & Davis for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

Plaintiff Stanek brought this action for personal injuries and property damage resulting from a collision which occurred on January 3, 1977, between a motor vehicle operated by her and one driven by the

defendant Swierczek in the course of his employment by the defendant Messer's Auto Body Supply, Inc. The trial court found as a matter of law that the defendants were guilty of negligence which was the proximate cause of the collision. It submitted to the jury the questions of proximate cause and the amount of damages. The jury returned a verdict in the sum of $13,445.

The defendants have appealed to this court and assign and argue that the trial court erred in the following respects: (1) In directing a verdict against the defendants on the issue of liability; (2) In refusing to instruct the jury on the doctrine of sudden emergency (NJI 3.09) as requested by the defendants; and (3) In failing to sustain the objections of the defendants to the introduction in evidence of the cost to the plaintiff of procuring a policy of health insurance after the accident, and in instructing the jury that it could consider such cost as an element of damage included in "[t]he reasonable cost of medical and hospital insurance incurred to date and reasonably expected to continue in the future," which proximately resulted from the negligence of the defendants.

We hold that the court properly found as a matter of law that the negligence of the defendants was the sole proximate cause of the collision and that the trial court was correct in refusing to instruct on the sudden emergency doctrine. We further hold that the court erred in permitting the jury to consider, as an element of damage, the cost of medical and hospital insurance procured after the accident. We reverse the judgment and remand the cause for retrial on the issue only of the amount of damages proximately caused by the defendants' negligence.

The facts of the accident are without significant dispute. The collision occurred on Railroad Avenue, just north of its intersection with Drexel Street in the city of Omaha. Railroad Avenue is a four-lane street. The plaintiff, driving in the southbound inside

lane of Railroad Avenue, stopped her car at the edge of the intersection and signaled a left-hand turn. She waited for oncoming traffic in the northbound lanes to clear in order to make that turn. She testified she had been waiting for about a minute when she was struck in the rear by the vehicle operated by Swierczek.

Swierczek's version of the accident was that he was proceeding south in the inside lane of traffic on Railroad Avenue, following a van at about two to four lengths. The van suddenly turned into the outside lane to go around the plaintiff's car. Swierczek then saw the plaintiff's car for the first time. He had not been able to see the plaintiff's car because the van's windows were dirty and he could not see through them. He testified he could not turn right because of traffic in the outside lane. He slammed on his brakes and slid on slush into the plaintiff's car. The photographs received in evidence indicate that damage to the plaintiff's car was severe.

We discuss the first two assignments together. The sudden emergency instruction which the defendants requested be given is as follows: "When a person by a sudden emergency which is not due to his own negligence is placed in a position of immediate danger and has insufficient time to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as is required under ordinary circumstances, and if he pursues a course of action to avoid an accident, such as an ordinary, prudent person placed in a similar position might choose, he is not guilty of negligence, even though he did not adopt the wisest choice." NJI 3.09. It is a general rule: "[S]ubject to exceptions not applicable to this case . . . it is negligence as a matter of law for a motorist to drive an automobile on a public highway at any time at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within the range of vision in the direction he is traveling."

Stanley v. Ebmeier, 166 Neb. 716, 90 N.W.2d 290 (1958) (syllabus of the court). It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead, and the rule applies to driving in the daytime when vision is obstructed by physical conditions. *Pool v. Romatzke*, 177 Neb. 870, 131 N.W. 2d 593 (1964).

"The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it." *Davis v. Dennert*, 162 Neb. 65, 75 N.W.2d 112 (1956) (syllabus of the court). The sudden emergency rule is not applicable when the invoking party brings about the situation himself by a failure to exercise due care. *Stanley v. Ebmeier, supra; Ritchie v. Davidson*, 183 Neb. 94, 158 N.W.2d 275 (1968).

The obstruction of the defendant's view by the van was simply an existing condition of which the defendant was fully aware. The same may be said of the condition of the street. A driver, traveling on city streets carrying a considerable amount of traffic, should anticipate that a vehicle preceding him may change lanes and may be required to do so by the slowing or stopping of vehicles making lawful turns. There is no evidence that either plaintiff or the driver of the van was guilty of any negligence whatsoever. The presence and movement on the street of these vehicles under the circumstances shown by the evidence were simply conditions of which the defendant was aware or bound to anticipate. *Maurer v. Harper*, 207 Neb. 655, 300 N.W.2d 191 (1981), is distinguishable because there the evidence was in dispute, and the

cars in question were traveling on an interstate limited-access highway with no directly intersecting streets and no left turns were permitted. The court did not err in directing the verdict against the defendant on the issue of liability for the collision, or in refusing to instruct on the doctrine of sudden emergency.

We now turn to the third assignment of error. As a result of the collision, plaintiff suffered a whiplash-type injury to soft tissue. She was treated by her family physician. He prescribed medication, wet heat packs, and the use of a cervical collar. He saw plaintiff in his office on January 3, 1977, and several times thereafter over a period of a few months. He last saw her on February 29, 1980, in preparation for trial. Her condition gradually improved, although she was still having minimal symptoms at the time of trial which would grow worse after participating in athletic activities such as swimming. The doctor predicted that the symptoms would continue for quite a long length of time. No one could say for certain how long. She saw two other physicians. Their testimony was not presented. However, one prescribed a home cervical traction unit and the other gave her a book on care of the neck. He also prescribed certain exercises which she was still carrying out at the time of trial. Her family doctor testified that in the future the use of cervical traction could be appropriate. Her family doctor did not refer her to a specialist, nor did he recommend nor did she receive hospitalization. He did not feel that there was any permanent disability.

Plaintiff incurred medical and drug expense for the above-described services and equipment, but no proof was made of the amount.

At the time of the accident, plaintiff was a high school student and employed only part time. Five months after the accident, on June 1, 1977, plaintiff went to work for the United States National Bank. As

an employee of the bank, she was entitled, without physical examination or restriction, to coverage under the employer's group health policy at a cost of $5.10 per month. She elected not to take that coverage because she was still covered by her parents' family policy. In July of 1978 she applied for group coverage with her employer and was unable to obtain group coverage because she still had symptoms of her injury. She then procured, from the insurer which carried her employer's group policy, individual coverage which was the same as that in the group policy, at a cost of $49.52 per month. An underwriter for the insurer testified that a new employee was entitled to coverage under the group policy within 31 days of beginning employment without evidence of insurability or a health statement. "Late entrant[s]," i.e., those not choosing to take the insurance during the first 31 days of employment, were considered on an individual basis. Plaintiff would be eligible for group coverage 1 year after complete recovery, i.e., after she had not been treated for 1 year. She would become eligible for reconsideration on May 1, 1980.

The contents and coverage of the individual policy were not offered in evidence. In her brief, plaintiff says that she "asks for increased health insurance premiums to serve the purpose of *such a fund* in protecting her from the costs of continued medical care necessitated by her injuries." (Emphasis supplied.) The reference, "such a fund," refers to the case of *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974), where the jury awarded $50,000 as a medical emergency fund in a $4,025,000 verdict. That case involved an 11-year-old quadraplegic with a life expectancy of 69.6 years, who would be completely disabled for life and therefore would be incapable of doing anything for himself. The amount of the verdict was challenged on appeal. The court, in holding the verdict reasonable, said at 241, 116 Cal. Rptr. at 739: "Respondents point *to evidence supporting*

the following composition of the verdict." (Emphasis supplied.) Included in the items described was the medical emergency fund.

Plaintiff asserts the following proposition of law: "A plaintiff whose future expenses for normal health insurance will be increased by reason of tortiously inflicted injury is entitled to recover his added expenses for health insurance from the tortfeasor." She cites various texts and case authorities for the proposition. We have examined them all and none support the general proposition. The cases cited include such factual situations as increased costs of a premature delivery over normal delivery where the premature birth was caused by the defendant's negligence, and added laundry expense because of bladder incontinence resulting from a negligently caused injury. None of the above cases are support for the proposition asserted.

It is a fundamental principle of the law of damages that a person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of medical care and expense incurred for the treatment of the injuries incurred to the time of trial, as well as the cost of those reasonably certain to be incurred in the future. *Yount v. Seager*, 181 Neb. 665, 150 N.W.2d 245 (1967).

In this case the plaintiff seeks to substitute a different measure of damages and one which the evidence does not show with reasonable certainty bears any relationship whatever to the medical expense incurred or reasonably certain to be incurred in the future. We think we may take judicial notice of the fact that the general health policy covers a variety of ailments and injuries and offers a variety of benefits and that the cost thereof bears no relationship whatever to the cost of treating a specific injury. We have been cited no authority which holds the cost of a general health policy may be substituted for proof of past and future medical expenses. The record contains no proof of

any kind to show any correlation between the cost of the health insurance and medical expenses to be incurred by the plaintiff in the future.

The judgment is reversed and the cause remanded for a new trial on the damage issue only.

REVERSED AND REMANDED.

CHRIS D. MANZER, APPELLANT, V. CLIFFORD PENTICO, DOING BUSINESS AS PENTICO INSURANCE AGENCY, APPELLEE.

307 N.W.2d 812

Filed July 2, 1981. No. 43424.

1. **Insurance: Principal and Agent.** It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued.
2. **Summary Judgment.** Summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.

Appeal from the District Court for Pierce County: RICHARD P. GARDEN, Judge. Affirmed.

Curtiss & Baird for appellant.

Dennis E. Martin of Dwyer, O'Leary & Martin, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

Plaintiff brought this action for damages against the defendant insurance agent for the defendant's alleged failure to obtain insurance to cover plaintiff's custom farming operations. After the taking of depositions and filing of interrogatories the District Court sustained defendant's motion for summary judgment and dis-

missed plaintiff's petition.

Plaintiff's petition alleged that the defendant had breached an oral contract to obtain insurance to cover the plaintiff's custom farming operations, and also alleged that defendant had agreed to obtain such insurance but had negligently failed to do so. Defendant's answer denied the material allegations of plaintiff's petition, alleged that defendant had no knowledge that plaintiff was engaged in the custom farming business, and set forth various affirmative defenses.

The record shows that plaintiff operates his own 240-acre dairy farming operation, a farm implement business, and a custom farming business. The plaintiff first purchased casualty insurance coverage for his dairy farming operation from the defendant in 1969 and from that time on the defendant provided the plaintiff with insurance coverage for the 240-acre operation. Defendant knew that plaintiff was engaged in the farm implement business but the defendant did not handle the insurance for that business. The defendant testified that he had no knowledge or notice that plaintiff was engaged in the custom farming business.

On June 15, 1977, while performing custom farming operations, the plaintiff improperly sprayed a client's field with 2-4-D, causing damages determined to be approximately $10,000. The plaintiff submitted the claim to defendant under the farm liability policy issued to the plaintiff through the defendant. The insurer denied liability on the ground that the policy did not cover custom farming operations. The plaintiff then commenced this action against the defendant.

The evidence is undisputed that the defendant was never directly informed of plaintiff's custom farming operations. The evidence is also undisputed that the defendant never told the plaintiff that custom farming operations were covered under the farm liability policy. The plaintiff admitted that he could not remember specifically informing the defendant of the custom farming operations or requesting the defendant to

provide insurance coverage for those operations.

Following the hearing on defendant's motion for summary judgment the District Court found that there was no genuine issue of material fact and that defendant was entitled to judgment as a matter of law. The District Court sustained the motion for summary judgment and dismissed plaintiff's petition.

On appeal the plaintiff contends that there is an issue of fact as to whether the defendant had knowledge that plaintiff was engaged in custom farming operations. Plaintiff relies upon his own testimony that at some time before 1977 he told the defendant in a conversation that the plaintiff had fertilized a crop on the wrong land and the owner had been very angry with him because of the error. Although that conversation may have been material as to whether the defendant should have known that the plaintiff was engaged in custom farming operations, it was not material as to whether the plaintiff had ever requested insurance coverage for his custom farming business, or whether the defendant had ever agreed to provide such coverage.

The case of *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980), is decisive of the case at bar. In that case we held that it is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued. See, also, *Collegiate Mfg. Co. v. McDowell's Agency, Inc.*, 200 N.W.2d 854 (Iowa 1972).

Upon a motion for summary judgment the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979).

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

JEANETTE MACK, APPELLANT, V. DALE ELECTRONICS, INC., APPELLEE.

307 N.W.2d 814

Filed July 2, 1981. No. 43668.

1. **Workmen's Compensation: Proximate Cause.** The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an "accident" arising out of and in the course of employment, entitling the individual to compensation under the Nebraska Workmen's Compensation Act. In order to receive that compensation it is necessary that the employee establish that the difficulties which the employee is experiencing were caused by an "accident" as defined by the Workmen's Compensation Act.
2. **Workmen's Compensation: Evidence: Proof.** Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony.
3. ____:____:____. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Larry R. Baumann for appellant.

Baylor, Evnen, Curtiss, Grimit & Witt for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Jeanette Mack (Mack), appeals from an order entered by a three-judge panel of the Nebraska Workmen's Compensation Court which, on rehearing, denied to Mack any right of recovery and dismissed her petition for the reason she failed to provide medical evidence showing a causal connection between the alleged accident and the claimed dis-

ability. We have reviewed the record and have determined that the action of the three-judge panel in dismissing the petition was correct, and we therefore affirm.

The relevant facts are virtually without dispute. It appears that Mack was employed by the appellee, Dale Electronics, Inc. (Dale), and was performing her duties for Dale on October 4, 1978. Her duties included operating a coding machine which, in part, painted transistors. As part of her duties, Mack was to clean the machine near the end of her duty shift. In doing so, Mack was to lift a 5-gallon container of paint dissolver and pour it into a little canister on the coding machine which removed the paint in the machine. Mack maintains that on October 4, 1978, while lifting and pouring dissolver from the 5-gallon can into the little canister, she felt and heard her back snap and has since that time, as a result of the "snap," suffered pain, discomfort, and an inability to perform as she did before her alleged accident. The principal difficulty with her argument, however, is that she has been unable to produce any medical testimony which will connect the cause of her alleged difficulty with the claimed accident which she maintains occurred on October 4, 1978.

Mack has been to a number of physicians, including a general practitioner, an orthopedist, and a neurosurgeon. None of them were able to find any objective evidence of residual disability attributable to the accident in question. Likewise, they were unable to state with any degree of medical certainty that her claimed problems are in any way connected to her alleged accident on October 4, 1978.

Mack maintains that the production of such evidence is not necessary. She maintains that she is entitled to recover solely on the basis that she has produced evidence to show that before October 4, 1978, she felt well and was able to do everything, and that after October 4, 1978, she has had constant

pain and is unable to do anything. The difficulty with that argument is that it totally ignores the language of the Workmen's Compensation Act. Neb. Rev. Stat. § 48-101 (Reissue 1978) provides as follows: "When personal injury is caused to an employee *by accident* or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury." (Emphasis supplied.)

Neb. Rev. Stat. § 48-151(2) (Reissue 1978) defines the word "accident" as follows: "The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury *was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.*" (Emphasis supplied.) The language of the statute is abundantly clear. The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an "accident" arising out of and in the course of employment, entitling the individual to compensation under the act. In order to receive that compensation it is necessary that the employee establish that the difficulties which the employee is experiencing were caused by an "accident" as defined by the Workmen's Compensation Act. In *Smith v. Stevens*, 173 Neb. 723, 725-26, 114 N.W.2d 724, 726 (1962), we said in part: "Plaintiff must show a causal connection between the accident suffered by him and the alleged disability."

Mack's reliance upon her testimony that before the pain experienced at work she could do everything, and after the pain she is disabled, absent objective evidence that an accident as defined by the act caused such disability, is misplaced. The evidence is insufficient even under a liberal construction of the Workmen's Compensation Act.

In *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 448, 288 N.W.2d 45, 48 (1980), we said: "[U]nless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. [Citation omitted.] This is such a case requiring expert medical testimony to show the requisite causal connection between the injury and the claimed disability." And in *Eiting v. Godding*, 191 Neb. 88, 91-92, 214 N.W.2d 241, 244 (1974), we said: "Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries." The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.

Where, as here, Mack is unable to produce any medical testimony connecting her discomfort with anything which occurred during the course of her employment, including the event on October 4, 1978, she has simply failed to meet her burden under the act and cannot recover. That was the finding made by the three-judge panel of the Workmen's Compensation Court on rehearing. The finding of the Workmen's Compensation Court on rehearing may not be set aside on the basis of the record as we find it. In *McCann v. Holy Sepulchre Cemetery Assn.*, *supra* at 448-49, 288 N.W.2d at 48, we said: "The findings of fact made

by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case, and such order may be reversed or set aside with respect to the evidence only where there is not sufficient evidence in the record to warrant the order or judgment. In testing the sufficiency of the evidence to support the findings, every controverted fact must be resolved in favor of the successful party and he should have the benefit of every inference that can be drawn therefrom. [Citations omitted.] Such findings on rehearing will not be set aside on appeal unless clearly wrong." In view of the fact that the record fails to disclose any evidence of causal connection, the judgment of the Workmen's Compensation Court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WARREN R. WATTS, APPELLANT.

307 N.W.2d 816

Filed July 2, 1981. No. 43789.

1. **Search Warrants: Motor Vehicles.** Generally, less stringent warrant requirements have been applied to vehicles.
2. **Search and Seizure: Motor Vehicles.** One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.
3. **Warrantless Searches: Motor Vehicles: Probable Cause.** The smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where there is sufficient foundation as to the expertise of the officer making the search.
4. **Search and Seizure: Motor Vehicles: Probable Cause.** The finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle.
5. **Statutes: Arrests.** Neb. Rev. Stat. § 28-416(6)(a) (Reissue 1979) merely authorizes the issuance of citation in the case of certain violations and

does not prohibit a police officer from arresting the offender whenever otherwise authorized by law.

6. **Constitutional Law: Arrests: Search and Seizure.** The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search.
7. **Search and Seizure.** Under certain circumstances, a furtive movement can produce the legal justification to search an automobile.

Appeal from the District Court for Keith County: HUGH STUART, Judge. Affirmed.

John P. Murphy of Ruff & Murphy for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

HASTINGS, J.

The defendant, Warren R. Watts, a resident of Colorado, has appealed from the District Court for Keith County where he was convicted of the offense of possession of marijuana with the intent to distribute, deliver, or dispense, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1979). The defendant was found guilty by the court sitting without a jury, and was sentenced to a term of probation for 2 years. The defendant assigns as error the failure to sustain his motion to suppress evidence seized pursuant to a warrantless search of defendant's car. We affirm.

On April 13, 1980, Watts was stopped by State Trooper Byron Lane of the Nebraska State Patrol for exceeding the speed limit. Trooper Lane approached the driver's side of the vehicle where the window was rolled down, and obtained Watts' driver's license and a rental agreement showing the car to be rented to the defendant. At that time Lane detected the smell of burnt marijuana. Trooper Lane then issued a warning

for speeding to Watts and asked him if there was or had been any marijuana in the vehicle, to which Watts replied, "No." The trooper then told Watts that he had smelled marijuana and asked him if he could look in the vehicle. Watts did not consent to the search. Trooper Lane looked over the back seat and saw a clear plastic bag containing a small amount of marijuana in plain view in a cooler with the lid partially off. At that time the defendant was placed under arrest for possession of marijuana and advised of his *Miranda* rights.

Trooper Lane then asked Watts if he had the trunk key, to which Watts replied that he had had it that morning but he could not locate it at that time. Lane then did a pat-down search of Watts, and found the key to the trunk in one of defendant's socks. Lane opened the trunk of the vehicle and observed three large trash bags, each containing twenty 1-pound bags of marijuana.

The defendant's sole assignment of error is the trial court's refusal to suppress the evidence found pursuant to the search of the automobile.

The U.S. Supreme Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles and the search of a home or office. "Generally, less stringent warrant requirements have been applied to vehicles." *Cardwell v. Lewis*, 417 U.S. 583, 589-90, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974). The treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a warrant impractical.

"The answer lies in the diminished expectation of privacy which surrounds the automobile: 'One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view.' *Cardwell v. Lewis*, 417 U.S. 583, 590

(1974) (plurality opinion)." *United States v. Chadwick*, 433 U.S. 1, 12, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977).

We have constantly held that the smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where, as here, there was sufficient foundation as to the expertise of the officer. *State v. Daly*, 202 Neb. 217, 274 N.W.2d 557 (1979), and the cases cited therein. We have further held that the odor of burned marijuana coming from the driver's compartment of a truck was sufficient probable cause to search the truck. *State v. Ruzicka*, 202 Neb. 257, 274 N.W.2d 873 (1979).

The defendant argues that the state trooper may have had probable cause to search the interior of the car, but after finding the bag of marijuana in the cooler, he could search no further without independent reason to believe that there was marijuana in the trunk. For support, the defendant refers this court to *Wimberly v. Superior Court*, 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976); *Commonwealth v. White*, 374 Mass. 132, 371 N.E.2d 777 (1977); *State v. Patino*, 163 N.J. Super. 116, 394 A.2d 365 (1978); and others. The holdings in those cases to the contrary notwithstanding, we believe it just as logical to conclude that the finding of the small amount of marijuana in the passenger compartment, after being told by the defendant that none existed, simply served to substantiate the officer's suspicions and furnish additional probable cause to make a complete search of the automobile. Having found a quantity of illicit drugs in one part of the automobile does not sensibly suggest the probability that no more such substance is present.

However, we need not reach this issue in the case at bar. Following the lawful seizure of marijuana from the cooler, the officer had probable cause to and did in fact arrest the defendant. Contrary to the position taken by the defendant, § 28-416(6)(a) simply authorizes the issuance of a citation rather than an arrest. It does not detract from the peace officer's

general authority to "arrest and detain any person found violating *any law* of this state." (Emphasis supplied.) Neb. Rev. Stat. § 29-401 (Reissue 1979). Also, Neb. Rev. Stat. § 29-404.02 (Reissue 1979) authorizes a peace officer to arrest a person without a warrant if the officer has "reasonable cause to believe that such person has committed . . . (2) a misdemeanor, and the officer has reasonable cause to believe that such person . . . (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the officer." The arrest was lawful.

"The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search." *Michigan v. DeFillippo*, 443 U.S. 31, 35, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). See, also, *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980).

The search of the defendant revealed the key to his automobile trunk secreted in a sock. By this time, the officer had legitimate knowledge that the automobile contained marijuana; that the defendant had lied to the officer about that fact as well as his knowledge of the existence or location of the trunk key; and that the defendant had deliberately placed the trunk key in a place where he felt the officer would not be able to find it. At this point the officer certainly had probable cause to believe that more marijuana might be found in the trunk.

Under certain circumstances, a furtive movement can produce the legal justification to search an automobile. *State v. Zimmerman*, 23 N.C. App. 396, 209 S.E.2d 350 (1974). In that case, it was held that defendant's furtive attempt to conceal a house key in the front seat of his automobile was sufficient justification for search of the automobile where there was probable cause to believe that the existence

of such key would be evidence of the defendant's guilt. Here, similar surreptitious actions and evasive answers on the part of the defendant justified the questioned search. See, also, *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979); Annot., 45 A.L.R.3d 581 (1972).

Finally, in *State v. Kretchmar*, 201 Neb. 308, 267 N.W.2d 740 (1978), reversed on other grounds at 203 Neb. 663, 280 N.W.2d 46 (1979), we approved a warrantless search of the trunk of defendant's automobile by an officer who smelled the odor of marijuana about the car and opened the trunk over the protestations and in spite of the physical opposition of the defendant.

The defendant's motion to suppress was correctly overruled, and the judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., MCCOWN, and WHITE, JJ., concur in result.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD E. CEMPER, APPELLANT.

307 N.W.2d 820

Filed July 2, 1981. No. 43809.

1. **Search and Seizure: Constitutional Law.** The capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place.
2. ____: ____. A person has no legitimate expectation of privacy in an open field in which he has no personal ownership or possessory rights, and cannot claim the protection of the fourth amendment as to unreasonable searches and seizures.

Appeal from the District Court for Holt County:

HENRY F. REIMER, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

MCCOWN, J.

The defendant was found guilty of the unlawful manufacture of a controlled substance in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1979) and sentenced to imprisonment for a term of 3 years, fined $1,000, and given credit for jail time.

The defendant waived jury trial, and by stipulation of the parties the transcript from the preliminary hearing and the evidence and testimony introduced at the hearing on defendant's motion to suppress constituted the record at trial. The defendant objected to all the evidence based on the contention that the evidence was obtained in violation of the defendant's fourth amendment right to be free from unreasonable searches and seizures.

Sometime prior to August 28, 1979, Trooper Hayes of the Nebraska State Patrol had received information from a confidential informant whose information had previously been reliable that there was a cultivated marijuana patch near O'Neill, Nebraska. On August 28, 1979, the informant told Hayes that he had located the marijuana patch in an irrigated cornfield southeast of O'Neill, Nebraska. That night Hayes, accompanied by the informant, entered the cornfield involved here through an open gate adjacent to a county road. After penetrating the growing corn for approximately 175 yards they found what appeared to be a very large patch of growing marijuana in the middle of the cornfield. Hayes took a small sample of the plants and left.

The samples were later tested and found to be marijuana.

The cornfield is located on a quarter section of land on the west side of U.S. Highway 275 approximately 3½ miles southeast of O'Neill. The quarter section is owned by Cemper Land Company, a partnership consisting of several members of the family of the defendant. The portion of the property located nearest the highway is occupied and used primarily by Cemper Equipment Company, which is owned by Ron Cemper, a brother of the defendant. There are several buildings on the part of the property occupied by Cemper Equipment Company which are used daily for storage and repair of equipment.

Hilger Land Company was farming the cropland on a sharecrop basis for 1979 and performed the planting, cultivation, and subsequently the harvesting of the corn crop. Several Hilger brothers were involved in the operation but none of them were on the property during the times involved here.

The defendant was employed by Cemper Equipment Company as a welder. He testified that he had also been given responsibilities by Cemper Land Company in connection with the center pivot irrigation system and in applying fertilizer to the corn. The record does not indicate that the defendant had an ownership interest in Cemper Land Company, Cemper Equipment Company, or Hilger Land Company, or any personal possessory interest in the land except as an employee.

The cornfield is on the portion of the quarter section farthest away from Highway 275 and to the west of the property occupied and used by Cemper Equipment Company. A seldom-used country road is located on the west side of the quarter section, and there is a gate in the fence along that road which is used in connection with the farming operation. That gate was always left open and it is the gate through which Trooper Hayes and the informant went into the field. The entire field is enclosed by a barbed wire fence with two openings in

the fence on the east side of the property along Highway 275. At some time the property had been posted with no-trespassing signs but they had been shot off. No signs were posted at any of the times involved here.

The marijuana patch was located approximately in the center of the cornfield and approximately ⅛ of a mile west of the buildings of the Cemper Equipment Company. The growing marijuana was not visible from the borders of the property, from the buildings, nor from any location outside the cornfield due to the height of the growing corn. After August 28, 1979, Trooper Hayes made periodic observations of the property from the road and on September 18, 1979, again entered on the property with the informant and again observed the marijuana patch. On September 20, 1979, Hayes took a State Patrol investigator with him and showed him the marijuana patch. A full investigation followed, and on September 28, 29, and 30, and on October 2, the State Patrol conducted aerial surveillance of the property and took aerial photographs which are in evidence.

In the afternoon of October 3, 1979, an investigator of the State Patrol entered the property and hid in the corn near the marijuana patch. Thereafter three individuals, one of whom was the defendant, entered the marijuana patch and for approximately an hour picked and bundled the marijuana and the officer took photographs of the activity. When the three persons left the field they were arrested.

Jury trial was waived and the District Court found the defendant guilty as charged and sentenced him to imprisonment for a term of 3 years, fined him $1,000, and gave credit for jail time.

The sole issue on this appeal is whether Trooper Hayes' entry into the cornfield on August 28, 1979, constituted an unreasonable search within the meaning of the fourth amendment. The defendant asserts that he had a legitimate expectation of privacy in the invaded place and that the search was therefore illegal. The

State contends that under the "open fields doctrine" of *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), the specific protection accorded by the fourth amendment to the people in their "persons, houses, papers, and effects" is not extended to the open fields and that the search here was not illegal.

The defendant asserts that the open fields doctrine focusing on property rights in an invaded place has no further validity since *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); and *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). Those cases reflect the holdings of the Supreme Court of the United States that the capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. This court has already followed that mandate in at least two cases. See, *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980); *State v. Ohler*, 208 Neb. 742, 305 N.W.2d 637 (1981).

In the case now before us the critical question is, therefore, whether the defendant had a legitimate expectation of privacy in the marijuana patch in the middle of a cornfield under the circumstances disclosed by this record.

Following the decision in *Katz v. United States, supra*, some courts took the position that the *Katz* case had sounded the death knell of the open fields doctrine and had overruled *Hester* sub silentio. Other courts took the position that a straightforward application of *Hester* and the open fields doctrine was still proper. Nebraska adopted this position. See *State v. Poulson*, 194 Neb. 601, 234 N.W.2d 214 (1975). Still other courts took the view that as a per se exception to the fourth amendment the open fields doctrine had been substantially undermined by the doctrine that the fourth amendment pro-

tects people, not places. The open fields doctrine of *Hester* is viewed as merely an application of the principle that the fourth amendment protections do not apply where no reasonable expectation of privacy exists. Commentators on the subject have concluded that whichever of the approaches a particular court takes will seldom make any difference in terms of outcome. See, Lafave, Search and Seizure, A Treatise on the Fourth Amendment, § 2.4 at 334-35 (1978); Ringel, Searches and Seizures, Arrests and Convictions, § 8.4 (1980).

The original underpinnings of the open fields doctrine reflected the conclusion that it was unreasonable to conclude that objects placed in an open field would be safe from the prying eyes or hands of trespassers or other persons who might be present on the property. The open fields doctrine did not rest on ownership or possessory rights, but under the former emphasis on "place" there were still issues of standing which generally required rights of ownership or possession in the "place" in order to challenge a search. Although the focus on both of those issues of "place" and "standing" has now shifted to the person asserting the protection of the amendment, the use of property concepts in determining the presence or absence of the privacy interests protected by the fourth amendment has not been abandoned. See *Rakas v. Illinois, supra.*

In the case at bar the defendant asserts that he had a legitimate reasonable expectation of privacy in the middle of a cornfield which was owned by one company, of which he was an employee, and farmed by another company, with which he had no connection, in a rural area and on land on which no one resided. The field was enclosed by an ordinary barbed wire fence and the property was not posted against trespassers. At least one gate was always open. Although the marijuana was not visible from the borders of the property, it was clearly visible by aerial surveillance.

In the rural areas of this state it would be difficult to

find a landowner who would believe that no person would enter on his open field without permission. Hunters, fishermen, and other technical trespassers are so commonly expected in the rural areas of this state that a failure to post trespassing signs is regarded by many persons as almost an implied permission to enter. It is incomprehensible that an employee, who has no personal ownership or possessory interest in an open field, should have any legitimate expectation of privacy.

The fourth amendment protects persons but it does not protect them in every circumstance and in every place, public or private. Ownership and possessory rights in "places" are still important in determining whether or not a particular person has a legitimate expectation of privacy in a particular place. The open fields doctrine is not completely dead. Its reincarnated substance is still a vital part of the broader constitutional concept of freedom from unreasonable searches and seizures.

We hold that under the circumstances here the defendant had no legitimate expectation of privacy in an open field in which he had no personal ownership or possessory rights and therefore cannot claim the protection of the fourth amendment as to unreasonable searches and seizures.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., BOSLAUGH, BRODKEY, WHITE, and HASTINGS, JJ., concur in result.

STATE OF NEBRASKA, APPELLEE, V. EARL ROSENBERRY, APPELLANT.

307 N.W.2d 823

Filed July 2, 1981. No. 44043.

Judgments: Sentences. A judgment denying probation and imposing a sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion.

Appeal from the District Court for Polk County: WILLIAM H. NORTON, Judge. Affirmed.

Luckey, Sipple & Hansen and Mark M. Sipple for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

BOSLAUGH, J.

The defendant was charged in an amended complaint filed in the county court with operating a motor vehicle while under the influence of alcoholic liquor, second offense. Upon a plea of guilty he was sentenced to 18 months' probation. The probation included a fine of $200, 30 days in jail after 6 months of probation, and 30 days in jail at the end of the probation period, but the court for good reason could waive all or any part of the jail sentences. The defendant was required to enter a 30-day inpatient treatment for alcoholism at his own expense. The order further provided the defendant's operator's license would be impounded for 1 year, but after the defendant had returned from inpatient treatment the court would consider driving privileges based on the defendant's performance at inpatient treatment.

The defendant did not accept the terms of the probation but appealed to the District Court. The

District Court remanded the cause to the county court on the ground there was no final order because the sentence of probation was a conditional order which had not been accepted by the defendant. The defendant did not appeal from the order of the District Court and there is no issue in this court concerning the order remanding the cause to the county court for further proceedings.

On November 12, 1980, the defendant was sentenced to 5 days in jail, fined $300, and his operator's license was revoked for a period of 1 year. The defendant again appealed to the District Court, where the sentence was affirmed. The defendant has now appealed to this court and contends that the sentence imposed was excessive and the trial court abused its discretion in failing to grant probation.

The offense to which the defendant pleaded guilty was a Class III misdemeanor with a maximum penalty of 3 months' imprisonment, a $500 fine, or both. Neb. Rev. Stat. § 39-669.07(2) (Reissue 1978); Neb. Rev. Stat. § 28-106(1) (Reissue 1979). A 1-year suspension of the operator's license is mandatory under the statute. The sentence of 5 days in jail with a fine of $300 was well within the statutory maximum.

The offense involved in this case was somewhat aggravated because it also involved leaving the scene of a property damage accident. On the night that the defendant was arrested he had been drinking at a tavern in Shelby, Nebraska. After leaving the tavern the defendant drove his pickup truck into the front of a beauty shop. He then backed away and left the scene of the accident. His offense in 1977 had also involved leaving the scene of a property damage accident.

On August 4, 1980, after the first sentencing hearing in county court, the defendant completed a 30-day inpatient treatment for alcoholism at the Veterans Hospital in Lincoln, Nebraska. Although the reports concerning that treatment do not appear in the record,

they were available to the county judge at the sentencing hearing on November 12, 1980. The record does indicate that the defendant participated only minimally in the discussion sessions and had attended "probably 8" Alcoholics Anonymous meetings after his discharge from the hospital. The defendant also admitted that on one occasion he had consumed a small quantity of beer. These were matters that the county court could consider and did consider in determining whether to place the defendant on probation.

The record does not show an abuse of discretion in failing to grant probation. The judgment is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

JOHN R. DOYLE ET AL. V. UNION INSURANCE COMPANY, A CORPORATION, ET AL.; FIRST NATIONAL BANK & TRUST COMPANY OF LINCOLN, A CORPORATION, APPELLEE, V. WILLKIE, FARR & GALLAGHER, APPELLANT.

308 N.W.2d 322

Filed July 10, 1981. No. 43197.

1. **Attorney Fees.** An attorney's claim for professional services against persons sui juris, or against the property of such persons, must rest upon a contract of employment, express or implied, made with the person sought to be charged or with his agent.
2. **Pleadings: Words and Phrases.** The term "application" is a generic term which includes, but is not limited to, motions.
3. **Affidavits.** As a general rule, an affidavit is not admissible to establish facts material to the issue being tried.
4. **Trial: Evidence.** It is within the discretion of the District Court to take testimony orally for the determination of issues of fact arising upon motions, and not a right of either party to compel the adduction of such testimony.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Robert C. Guenzel and Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester for appellant.

Warren C. Johnson of Cline, Williams, Wright, Johnson & Oldfather for appellee First National.

M. J. Bruckner and W. Scott Davis of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for class.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and COLWELL, District Judge.

BRODKEY, J.

This is the second appeal of the above-captioned case to this court. The general factual background of this litigation is set out in our first opinion in *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979), and will not be repeated here except as pertinent and necessary to understand the issues in this appeal.

This action involves the claim of Willkie, Farr & Gallagher, a New York law firm, for attorney fees allegedly performed for and on behalf of First National Bank & Trust Company of Lincoln, appellee in this appeal, the trustee under a certain trust agreement entered into on March 19, 1973, by and between the old Union Insurance Company (Mutual) and the new Union Insurance Company, a stock company, both of Lincoln, Nebraska, who are referred to in the trust agreement as grantors, and First National Bank & Trust Company of Lincoln, hereinafter referred to as Trustee, or First National. It appears that Willkie, Farr & Gallagher submitted to the Trustee a statement in the amount of $17,552.55 for professional services rendered to the trust during the years 1976 and 1977 on account of the claim by the Internal Revenue Service from the trust for tax payments in connection with the transfer of the assets of the old Union Insurance Company (Mutual) to the new Union Insurance Company (Stock). Willkie, Farr

& Gallagher successfully defended the tax claim by the Internal Revenue Service, and obtained a substantial reduction in the amount of the deficiency claimed. Upon receipt of the invoice of the law firm for such services, the Trustee, on November 30, 1979, filed in the original action in the District Court of Lancaster County what it entitled an "Application." In its application, First National alleged it was trustee for the tax escrow account held for the benefit of policyholders of Union Insurance Company (Mutual), and alleged the receipt of the statement for professional services above referred to from Willkie, Farr & Gallagher, and further alleged that the trustee had not in any manner retained Willkie, Farr & Gallagher to represent the Union Insurance Company (Mutual) policyholders and suggested that the court hold a hearing with reference to a claim of that law firm. The prayer of that application was as follows: "WHEREFORE, this Trustee prays that after due notice and hearing the Court determine whether the claim filed by Willkie, Farr & Gallagher as described above should be paid, and if so, the amount thereof and the party who should make payment, and for such other relief as is just and equitable in the premises."

Following a hearing held on December 18, 1979, the District Court entered its order finding, in material part, as follows: "The court finds that the claim of Willkie, Farr & Gallagher should be and hereby is denied and that all the amount in controversy shall be paid to the policyholders of Union Insurance Company (Mutual) pursuant to the terms of the order of distribution entered by this court." Willkie, Farr & Gallagher has appealed to this court from that order, alleging in its assignments of error: (1) That the trial court erred in denying its claim for attorney fees; and (2) That the trial court erred in refusing to admit in evidence the affidavit and attachments thereto of Jack H. Nusbaum, a member of that firm.

At this point, it will be helpful to examine the facts and background of the original action. *Doyle* originated as a class action suit filed on behalf of the policyholders of the old Union Insurance Company, a mutual company, against the directors of that company. In that action it was alleged that the directors had violated their fiduciary duty by selling the assets of Union (Mutual) to a newly created stock company, Union Insurance Company (Stock), for less than their real value. On appeal, this court affirmed the judgment of the District Court rendered against the directors after trial in the sum of $2,567,500 as damages, which amount was in addition to the $8,300,000 value placed on the dividend declared to the Union (Mutual) policyholders. *In that action, Willkie, Farr & Gallagher represented the defendant directors of Union (Mutual).*

As previously stated, on March 19, 1973, and prior to trial, a trust agreement was entered which created a tax escrow account for the benefit of the Union (Mutual) policyholders, pending a final determination as to the tax status of certain dividends. That trust agreement, dated March 19, 1973, provided that First National was to act as trustee of the account and was to hold the trust funds in escrow with authority to invest the trust assets on favorable terms until such time as the grantors received a final determination of the tax controversy. The grantors of the trust were Union (Mutual) as the original grantor until April 19, 1973, at which time it ceased to exist, and the new Union (Stock) was to succeed to the rights and liabilities of the old Union (Mutual). Specifically, the trust agreement provided, *inter alia,* as follows:

"THIRD: Dividend and Bulk Reinsurance Agreement. This trust agreement arises as a result of a Bulk Reinsurance Agreement which is attached hereto and incorporated herein. *The trust property is a dividend payable to policyholders* of Union Insurance Company (Mutual), dependent upon receipt of favorable ruling

from the Internal Revenue Service all or more fully set out in the Bulk Reinsurance Agreement attached hereto and incorporated herein.

"FIFTH: Termination of Trust. Upon receiving a final determination from the Internal Revenue Service the Grantors shall advise the Trustee of such determination and this trust agreement shall forthwith terminate and the trust property along with all gains arising therefrom of any nature whatsoever shall be returned to the grantors for distribution to the eligible policyholders of Union Insurance Company (Mutual) as they are defined in the attached Bulk Reinsurance Agreement; provided, however, that the Grantors may, with the specific written approval of the Director, Nebraska Department of Insurance, to [sic] terminate this trust upon 30 days notice to the Trustee." (Emphasis supplied).

On December 1, 1977, the U.S. Tax Court rendered its decision with regard to the tax dispute; and, as previously stated, on September 6, 1979, the appellant rendered its bill for attorney fees to First National, following which First National filed its "Application" in the District Court of Lancaster County.

In our original opinion in this matter, we stated: "Whatever the merits of the tax arguments with the Internal Revenue Service, that part of the tax escrow account remaining after final settlement with the Internal Revenue Service was Old Union's property, having arisen either from a refund of past income tax, or reserves for taxes which were not in fact payable. Furthermore, the bulk reinsurance contract specifically provided that the amount remaining would be paid to the policyholders of Old Union. The argument of the appellants on this item is ludicrous and merits no further discussion." *Doyle* at 623, 277 N.W.2d at 48.

Notwithstanding, the appellant contends on appeal that the trust has received a substantial benefit

from the services rendered before the tax court and that this court should impose a contract to prevent unjust enrichment on the part of the Trustee.

Under the terms of the trust agreement, the duties and authority granted to the Trustee were extremely limited. The Trustee was granted authority to invest the assets and the income in certificates of deposit and U.S. Treasury Notes as in the discretion of the Trustee would provide the highest rate of return. The Trustee was also obligated to render semiannual accounts to the grantors and to the director of the Nebraska Department of Insurance. Nowhere does the trust agreement grant authority to the Trustee to conduct any litigation or to retain counsel. Rather, the trust agreement states that upon the dissolution of Union (Mutual) on or about April 19, 1973, Union (Stock) would be deemed the successor grantor of the trust and succeed to all the assets, liabilities, rights, and obligations of the mutual company. It would appear that after the dissolution of Union (Mutual), the obligation to resolve the tax dispute fell to Union (Stock) as the remaining grantor through such counsel as it retained.

The trust agreement also explicitly provided that when the grantors received a final determination from the Internal Revenue Service, it was the responsibility of Union (Stock) as the surviving grantor to advise the Trustee of that determination. Thereafter, the trust agreement would terminate and the trust property would be returned to the grantor for distribution to eligible policyholders of Union (Mutual). It was also provided under the agreement that the Trustee would receive no compensation for its role as Trustee, and the authority as to expenditures was limited to reimbursement for actual expenses incurred. We note that when this agreement was made in 1973, the Nebraska Trustees' Powers Act had not been enacted and the Trustee was reduced to a stakeholder to invest the funds, pending a final determination by the

Internal Revenue Service.

At the hearing held in this matter on December 18, 1979, Robert Kahm, vice president and trust operations officer for First National, testified that the Trustee had not retained the appellant law firm to represent the trust in the action before the tax court. The record discloses that the Trustee executed powers of attorney for the tax years involved to the accounting firm of Touche Ross & Co., at the request of the grantor. No evidence was presented that this power was ever delegated to the appellant. The sole power of attorney given by the Trustee to the appellant pertains to an Internal Revenue Service audit of the trust fiduciary for the taxable year ending January 31, 1975, and does not pertain to the tax deficiency controversy before the tax court.

Under the terms of the trust agreement it is clearly contemplated that a resolution of the tax dispute was to be pursued by the grantors, with the Trustee acting as a mere escrow agent until a final determination by the tax court. Upon such determination, the agreement contemplates the return of the trust property to the grantor, who is required to distribute the trust property to the eligible policyholders of Union (Mutual). It would appear that the appellant firm was hired by the successor grantor, Union (Stock), pursuant to its obligation under the agreement. Any actions taken were those performed pursuant to instructions of the grantor; and nothing in the record indicates any conduct on the part of the Trustee which would lead the appellant to believe that payment for its legal services would be made from the trust assets, which by law belonged to the policyholders of Union (Mutual).

The appellant also urges this court to apply principles of quasi-contract in this case to prevent unjust enrichment on the part of the Trustee. A similar argument was rejected by this court in the case of *In re Estate of Kierstead*, 121 Neb. 423, 237 N.W. 299 (1931), in which case attorneys who represented

certain heirs of the estate sought to recover attorney fees from other heirs who were not represented by the attorneys but who had benefited as the result of a settlement procured by the attorneys. The District Court found for the intervenor attorneys and allowed the recovery of a limited fee. On appeal, this court reversed the holding of the trial court, stating: "'An attorney's claim for professional services against persons *sui juris*, or against the property of such persons, must rest upon a contract of employment, express or implied, made with the person sought to be charged or with his agent. No one can legally claim compensation for voluntary services to another, however beneficial they may be, especially where rendered without his knowledge or consent, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another by whom the attorney may have been employed. * * * So, where one of several parties, all of whom are equally interested in a cause, employs an attorney to conduct the case for him, and the benefit of such services from the nature of the case extends to all the other interested parties, the other parties, merely by standing by and accepting the benefit of such services without objection, do not become liable for the attorney's fees.'" *Id.* at 426, 237 N.W. at 300.

In the present case, it appears that the appellant performed legal services for the successor grantor under the trust agreement which indirectly benefited the policyholders of Union (Mutual). The plaintiff class was already represented by counsel; and the precedent and logic of *Kierstead* compels us to conclude that appellant is not entitled to attorney fees from the Trustee merely because it claims to have benefited the policyholders of Union (Mutual). We would also note at this point that during the time period for which the appellant seeks payment, the firm of Willkie, Farr & Gallagher was actively opposing the interests of the policyholders of Union (Mutual), as is evident

from the opinion in *Doyle*.

The appellant also contends that the trial court erred by refusing to admit into evidence the affidavit of Jack Nusbaum, an attorney in appellant's law firm. We note that the bill submitted by Willkie, Farr & Gallagher does not itemize the work that was performed or the time spent preparing the case for which it seeks payment from the tax escrow account. The record indicates that no member of the appellant firm was personally present at the hearing to support its claim, and that the affidavit of Nusbaum was not submitted to the court or opposing counsel until the day before the hearing.

In support of its contention that the affidavit in question should have been admitted in evidence by the trial court, the appellant contends that the application filed by First National in this case was in fact a "motion," and that under our statutes, it is proper to use affidavits in connection with motions. Neb. Rev. Stat. § 25-908 (Reissue 1979) defines the term "motion" as follows: "A motion is an application for an order addressed to the court or a judge in vacation, by any party to a suit or proceeding, or one interested therein." Likewise, Neb. Rev. Stat. § 25-1244 (Reissue 1979) provides: "An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, *or upon a motion*, and in any other case permitted by law." (Emphasis supplied.) The application of this latter section apparently bothered the trial court, too, as it stated in response to the argument to that effect before it: "I have always thought when they were talking about motion, they were talking about motions that we are used to in pleadings, motion to make more definite and certain, motion for summary judgment and that type of thing."

In a broad general sense, every petition filed at the commencement of an action is, in effect, an application

to the court for an order or rule of the court. It is to be noted, however, that the Trustee in this case instigated this proceeding with reference to a declaration of its liability to pay attorney fees from the escrow account by filing in the original action what it has termed an "Application." In *Wright v. Royse*, 43 Ill. App. 2d 267, 193 N.E.2d 340 (1963), the court held that the word application was a generic term which includes, but is not limited to, motions. In that case, the court stated: "Appellees cite several cases which hold, consistently with the definition contained in Black's Law Dictionary that 'motions' are 'applications.' Appellees then argue that if 'motions' are 'applications,' therefore, all 'applications' are 'motions' and must be made in the form of a written motion, in accordance with prescribed motion procedures. This is a nonsequitur. The word 'application' is a generic term which includes, but is not limited to 'motions.'" *Id.* at 274, 193 N.E.2d at 343. In this connection we have also noted the case *In re Meyer v. Meyer, Admin.*, 138 Ind. App. 649, 215 N.E.2d 556 (1966), which case involved an appeal from a judgment awarding the appellant, a practicing attorney, the sum of $5,000 as an additional fee for professional services rendered as the attorney to the administrator of the estate of Mary Meyer, deceased. In that case the court held that where the duties of an attorney to the administrator were at an end and there was nothing further to be resolved and his connections to the estate were completely severed, even though the estate was kept open, the entry of an award for attorney fees constituted a "final judgment" and not an "interlocutory decree." Although the facts of that case were admittedly somewhat different from the facts of the instant case, we believe there is an analogy between the two situations, notwithstanding in the instant case the "Application" was filed a considerable length of time after the determination of the merits of the original action. We do not believe that the hearing

on the application in this case was a "preliminary, collateral and interlocutory matter" under § 25-1244. The general rule is that an affidavit is not admissible to establish facts material to the issue being tried. *Banks v. Metropolitan Life Ins. Co.*, 142 Neb. 823, 8 N.W.2d 185 (1943). However, even if we were to interpret or consider the "Application" filed in this case as a motion, it would not, we believe, in any way change the validity of the action of the trial court in refusing to accept the affidavit in question into evidence. In *Erdman v. National Indemnity Co.*, 180 Neb. 133, 138, 141 N.W.2d 753, 756 (1966), we held: "'It is within the discretion of the district court to take testimony orally for the determination of issues of fact arising upon motions, *and not a right of either party to compel the adduction of such testimony.*'" (Emphasis supplied.)

After the conclusion of the prior appeal, the judgment fund and the tax escrow account were, in effect, merged for the purpose of distribution. It was at this time that the claim of the appellant for attorney fees from the tax escrow account occasioned the filing of the "Application" by First National. The District Court had jurisdiction over the judgment fund, and properly held the hearing below to determine the validity of the appellant's claim against the tax escrow account. We determine that the order of the trial court was proper and must be affirmed, so that an orderly distribution of the tax escrow fund may be completed. We do not mean to hold or imply that appellant is not entitled to recover from its client for the services rendered, but only that appellant is not entitled to be paid for such services from the tax escrow account represented by the Trustee, First National.

The judgment of the District Court must be affirmed.

AFFIRMED.

FLORENCE F. LANE, APPELLEE AND CROSS-APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN CORPORATION, APPELLANT AND CROSS-APPELLEE.

308 N.W.2d 503

Filed July 10, 1981. No. 43270.

1. **Insurance: Motor Vehicles: Statutes.** Neb. Rev. Stat. § 60-509.01 (Reissue 1978), providing for uninsured motorist coverage, was enacted for the benefit of the innocent victim of a financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose.
2. **Insurance: Motor Vehicles: Judgments.** It is not a prerequisite to recovery under an uninsured motorist policy provision that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the automobile liability insurer.
3. **Expert Witnesses: Words and Phrases.** Although it is frequently stated that medical testimony must be given with "reasonable medical certainty," it is sufficient when such testimony is stated in terms of "probability." In this connection, "reasonable certainty" and "reasonable probability" are one and the same thing.
4. **Expert Witnesses.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Neb. Rev. Stat. § 27-702 (Reissue 1979).
5. **Jury Instructions: Appeal and Error.** When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given.
6. _____: _____. Instructions must be taken as a whole and construed together, and where the instructions covered the issues and fairly submitted the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous.
7. **Attorney Fees.** In determining the award of attorney fees, the court *may consider* the actual agreement existing between a litigant and his attorney, including an obligation to pay a contingent fee, particularly if such contract is customary in the locality. However, such agreement is neither the sole factor nor a factor to be given any greater weight than any other factor. The test is whether the fee is reasonably compensatory for the services rendered.
8. **Attorney Fees: Appeal and Error.** The trial court ordinarily has a better opportunity for practically appraising the award of attorney fees, and an appellate court will only interfere to correct a patent injustice where the allowance is clearly excessive or insufficient.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Wayne J. Mark of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellant.

Warren C. Schrempp and Steven Lefler for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ., and RONIN, Retired District Judge.

PER CURIAM.

Florence F. Lane (Florence), plaintiff-appellee herein, brought this action in the District Court of Douglas County, Nebraska, against State Farm Mutual Automobile Insurance Company (State Farm), defendant-appellant, to recover for personal injuries received arising from a motor vehicle collision, and has sued her insurer under the uninsured motorist provision of three insurance policies owned by the plaintiff. After a jury trial, a verdict was returned in favor of the plaintiff in the sum of $28,450, and the court subsequently taxed costs and attorney fees in the sum of $5,000 for the services of plaintiff's counsel against the defendant. We affirm.

The facts surrounding this appeal are as follows. On September 19, 1977, at approximately 5 p.m., the plaintiff was driving a car which collided with one driven by Debra Bronson (now Debra Logan), but hereinafter referred to as Debra. Florence was driving her vehicle northbound on 90th Street, a thoroughfare consisting of two northbound traffic lanes and two southbound traffic lanes. A concrete median separates the opposing traffic lanes; however, two left turn lanes are cut into the median to provide access to local shopping centers and businesses. Prior to the accident, Debra was traveling southbound on 90th Street and entered the left turn median lane intending to cross the northbound traffic lanes and go into a nearby parking lot. As she pulled across the northbound lanes, she struck the automobile being driven by the plaintiff. Florence sustained injuries

to her neck, back, and knees and was transported by ambulance to a nearby hospital where she was treated and released. Debra was subsequently cited for negligent driving.

In her original petition filed in the District Court of Douglas County on March 1, 1978, the plaintiff named as parties defendant to the action State Farm, Debra Bronson, and Martha J. Bronson. On April 17, 1978, State Farm filed a demurrer to the petition, alleging that it failed to state a claim upon which relief could be granted for the reason that it failed to allege a judgment against Debra, who was alleged in the petition to be an uninsured motorist under the laws of the State of Nebraska. A hearing was held on the demurrer on May 1, 1978, and the court subsequently entered an order sustaining the demurrer on the basis of misjoinder of causes of action, and gave the plaintiff 14 days to amend her petition. See *Eich v. State Farm Mut. Automobile Ins. Co.*, 208 Neb. 714, 305 N.W.2d 621 (1981).

On May 9, 1978, plaintiff filed her amended petition naming State Farm as the only defendant, and praying for a judgment against State Farm for "all sums for which the insured, the plaintiff herein, shall be legally entitled to recover as damages from the owner or operator of the uninsured motor vehicle in question . . . ." State Farm subsequently filed a demurrer to the amended petition, alleging that it also failed to state a cause of action. After the hearing on the defendant's second demurrer was held, the trial court entered an order on May 25, 1978, overruling the demurrer. The defendant was given 14 days to answer plaintiff's amended petition. In its answer, State Farm admitted to issuing one policy of automobile insurance to the plaintiff and that said policy contained uninsured motorist coverage in the amount of $15,000. State Farm denied in its answer that Debra was an uninsured motorist, and alleged that the accident occurred as the proximate result of

contributory negligence on the part of the plaintiff.

Notwithstanding the denial contained in the answer to the amended petition filed by State Farm that Debra was an uninsured motorist, at the commencement of the trial of the matter on November 6, 1979, the following stipulation was entered into between the parties, as reflected by the record, as follows:

"MR. MARK: The next matter to take up is with respect to the answer of defendant's [sic] with the possibility that this amendment could be expanded to include the admission of the existence of other State Farm Insurance policies, upon confirmation of same defendant would at this time ask leave to amend its answer with respect to apparently there was some duplication, Paragraph 6 and 7, so as to delete Paragraph 6 and 7 and to add a new paragraph which would state that defendant admits at all times material here to [sic] Debra I. Bronson was an uninsured motorist, that the vehicle operated by Debra I. Bronson was an uninsured motor vehicle under the laws of the State of Nebraska and under the terms of the policy of insurance in force and effect between Florence F. Lane and State Farm Mutual Automobile Insurance Company.

"THE COURT: But in the event that you also amended to admit the two other policies, would you want to —

"MR. MARK: I would. To the extent that we can confirm this morning the existence of the two other policies, I would admit the vehicle was an uninsured vehicle under those policies as well.

"THE COURT: Under the terms of any policies of insurance that were in force and effect.

"MR. MARK: Fair enough, Your Honor, I don't have any problem.

"THE COURT: You would have no objection to that amendment?

"MR. SCHREMPP: No.

"THE COURT: Leave is granted and the petition

may be amended accordingly. The answer may be amended accordingly."

By virtue of the foregoing stipulation of the parties, and approval by the trial court, the issue of whether Debra was an uninsured motorist under defendant's policy and whether the vehicle was an uninsured vehicle thereunder appears to have been completely removed from the case. The record also reveals a further stipulation between the parties was subsequently entered into as follows:

"(At 11:35 a.m. on November 7, 1979, with counsel for the parties and the parties present, and the jury in the box, the following proceedings were had:)

. . . .

"MR. SCHREMPP: Your Honor, may we stipulate, Mr. Mark, that at the time of the collision involved in this case there were three policies of insurance totaling $45,000 of uninsured motorist coverage in force and effect at that time, and subject to distribution in this case.

"MR. MARK: It is so stipulated, Your Honor.

"THE COURT: Very well, the stipulation is accepted and received as evidence . . . ."

We also note that immediately prior to the commencement of trial, the defendant made an offer to confess judgment in favor of the plaintiff in the amount of $12,500, which offer, however, was rejected, and the case then proceeded to trial as an ordinary automobile negligence action.

At the close of the evidence adduced at trial, plaintiff moved for a directed verdict in her favor on the issue of liability, leaving to the jury only the issues of proximate cause of plaintiff's injuries and damages. This motion was sustained by the trial court. State Farm also orally moved for a directed verdict on the issues of liability and proximate causation, which motion was overruled by the court. The matter was submitted to the jury on the issue of damages, and the jurors were instructed that their verdict could not exceed the

total amount of coverage provided by the defendant.

On November 8, 1979, the jury returned a verdict in favor of the plaintiff and assessed the amount of her recovery in damages in the sum of $28,450. The trial court taxed the costs of the trial to the defendant. A motion by defendant for a new trial was overruled by the trial court. A subsequent hearing was held to determine the allowance of attorney fees for plaintiff's counsel, following which the trial court ordered that an attorney fee in the amount of $5,000 be taxed to the defendant. Plaintiff's counsel also filed a motion for new trial on the award of attorney fees only, which motion was overruled, and the issue is raised by plaintiff's counsel in his cross-appeal.

In its brief on appeal, State Farm assigns as error: (1) That the trial court erred in holding that the plaintiff need not plead and prove a judgment against the uninsured motorist in order to sustain her cause of action against State Farm, which was the effect of the trial court's overruling defendant's demurrer to plaintiff's amended petition; (2) That the trial court erred in sustaining plaintiff's motion for a directed verdict on the issue of liability and in refusing to submit the issue of plaintiff's comparative negligence to the jury; (3) That the trial court erred in overruling defendant's motion for a directed verdict on the issue of the causal connection between the accident and plaintiff's alleged injury to her right knee because of a lack of competent medical evidence stated to a reasonable medical certainty relating said injury to the accident; or in the alternative that the trial court erred in failing to instruct the jury that the plaintiff had the burden of proving the causal relationship between the injury and the accident to a reasonable medical certainty by direct and competent testimony before damages could be awarded; and (4) That the court erred in instructing the jury that State Farm was obligated to pay the plaintiff all sums which she

has sustained as damages as a proximate result of the accident, said sums not to exceed the sum of $45,000; and also in instructing the jury that its verdict may not in any event exceed the total amount of the coverage provided by State Farm, in the sum of $45,000.

The principal issue raised by the defendant in this appeal is whether an insured motorist must obtain a judgment against an uninsured motorist as a condition precedent to recovering against his insurer under an uninsured motorist insurance policy. The almost universal rule in this regard is that he need not. This question is reviewed at length in Widdis, *A Guide to Uninsured Motorist Coverage* § 7.16 (1969), wherein that eminent authority states at 269-70: "In several cases, insurance companies have argued that the claimant must secure a determination on the issues of fault and damages by suing the uninsured motorist before he may bring an action against the insurance company under the uninsured motorist coverage. This approach has been rejected, except in Georgia, South Carolina, and Virginia." In the 1980 Supplement to the above volume, in the same section, Professor Widdis states at 318-19: "Although it would seem to be a matter that should be beyond dispute under both the terms of the endorsement and in light of the historical development leading up to this coverage, the right of the insured to sue his own insurer without first bringing an action against the uninsured motorist continues to be raised as an issue. The reported opinions of the courts almost uniformly support the right of an insured to proceed directly against the insurance company." In the same section previously referred to, the author, in discussing the contrary rule adopted by Georgia, South Carolina, and Virginia, states at 320: "In addition — in an opinion which in the view of this writer represents a tortured interpretation of the applicable statute and endorsement provisions — the Supreme Court of Tennessee has

adopted this view." Without in any way intending to be exhaustive of the jurisdictions which have adopted the general rule, we cite as exemplary the following cases: *State Farm Mutual Automobile Ins. Co., Inc. v. Griffin*, 51 Ala. App. 426, 286 So. 2d 302 (1973); *Byrn v. American Universal Ins. Co.*, 548 S.W.2d 186 (Mo. App. 1977); *Associated Indemnity Corporation v. Cannon*, 536 P.2d 920 (Okla. 1975); *Winner v. Ratzlaff*, 211 Kan. 59, 505 P.2d 606 (1973); *Home Ins. Co. v. Williams*, 252 Ark. 1012, 482 S.W.2d 626 (1972); *Ind. Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970); *Puckett v. Liberty Mutual Insurance Company*, 477 S.W.2d 811 (Ky. 1971); *Harthcock v. State Farm Mutual Automobile Ins. Co.*, 248 So. 2d 456 (Miss. 1971); *Grayson v. National Fire Insurance Company*, 313 F. Supp. 1002 (D. Puerto Rico 1970).

Our statute on uninsured motorist coverage appears as Neb. Rev. Stat. § 60-509.01 (Reissue 1978), and provides in part: "No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 60-509, under provisions approved by the Director of Insurance, for the protection of persons insured thereunder *who are legally entitled to recover damages* from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom . . . ." (Emphasis supplied.)

In interpreting this provision, we have previously held that § 60-509.01 was enacted for the benefit of the innocent victim of a financially irresponsible motorist and it is to be liberally construed to fully

accomplish that purpose. *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970).

Prior to the enactment of § 60-509.01, uninsured motorist coverage was permissible at the option of the purchaser of the automobile liability policy. Section 60-509.01 is considered mandatory in the sense that insurance companies must offer uninsured motorist coverage with every automobile liability policy issued in this state, but the insured may reject the coverage. The required minimum coverage limits of such policies are set out in Neb. Rev. Stat. § 60-509 (Reissue 1978).

In support of its position that the insured motorist must first obtain a judgment against the uninsured motorist as a condition precedent to bringing suit against the insurance carrier under the uninsured motorist coverage provisions, State Farm cites *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977). We conclude, however that *Crossley* is clearly distinguishable and not authority for the position taken in this case so far as Nebraska law is concerned. In *Crossley*, a Nebraska resident was involved in an automobile accident in Colorado and the accident was analyzed in terms of Colorado no-fault insurance laws, and not under § 60-509.01; and this court determined that the law of the place where the accident occurred governs not only the amount of the recovery but also the right to recover.

Defendant's argument was also rejected by the Supreme Court of Kansas in *Winner v. Ratzlaff*, *supra*, a case in which the plaintiff sought damages for the wrongful death of his wife, who was struck and killed by a car while walking across a street. Plaintiff sought recovery against his insurance carrier under the terms of his uninsured motorist policy. In construing the Kansas uninsured motorist statute, a statute similar to our own, the court stated at 63-65, 505 P.2d at 610-11:

"The purpose of legislation mandating the offer of

uninsured motorist coverage is to fill the gap inherent in motor vehicle financial responsibility and compulsory insurance legislation and this coverage is intended to provide recompense to innocent persons who are damaged through the wrongful conduct of motorists who, because they are uninsured and not financially responsible, cannot be made to respond in damages [citation omitted]. As remedial legislation it should be liberally construed to provide the intended protection.

"40-284 contains no language stating that suit must first be filed or judgment obtained against the uninsured motorist. In a nutshell, the coverage mandated is that which the beneficiary 'shall be legally entitled to recover as damages' sustained at the hands of an uninsured motorist. We cannot translate this language into the requirement urged by appellees. Knowledge of the context in which this coverage developed forcefully attests to the fact it was in part promulgated to eliminate just such a condition precedent. . . .

"We construe the words 'legally entitled to recover as damages' to mean simply that the insured must be able to establish fault on the part of the uninsured motorist which gives rise to the damages and to prove the extent of those damages. This would mean that in a direct action against the insurer the insured has the burden of proving that the other motorist was uninsured, that the other motorist is legally liable for damage to the insured, and the amount of this liability. In resisting the claim the insurer would have available to it, in addition to policy defenses compatible with the statute, the substantive defenses that would have been available to the uninsured motorist such as contributory negligence, etc. [citation omitted].

"We have recognized the right of the uninsured motorist insurance carrier to intervene as a matter of right in an action brought by its insured against

an uninsured motorist where its application is timely and its interests are not being adequately represented [citation omitted]. Multiple litigation is never desirable and there is a public interest economically in avoiding it wherever possible to do so in a fair and workable manner. Everything considered, we hold it is not requisite to recovery against an uninsured motor liability carrier that judgment first be obtained against the uninsured motorist."

We concur with the aforementioned pronouncements of the Kansas Supreme Court as they apply to the factual circumstances in the present case; and we hold that it is not a prerequisite to recovery that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the insured motorist's liability carrier. To the extent that *Eich v. State Farm Mut. Automobile Ins. Co.*, 208 Neb. 714, 305 N.W.2d 621 (1981), holds to the contrary, it is overruled. In its brief on appeal, State Farm has pointed out certain problems of trial which could, and occasionally do, arise under the application of the majority rule which we adopt. Suffice it to say that if a change in the existing law is necessary or desirable, that change should be effected by action of the Legislature, and not by a tortured interpretation by this court. We also point out that under the Nebraska statute, as above quoted, there is no requirement whatsoever that a suit be brought and judgment obtained against the uninsured motorist as a precondition to an action against the insurance carrier.

We next consider defendant's assignment that the court erred in sustaining plaintiff's motion for directed verdict on the issue of liability and in refusing to submit the issue of plaintiff's comparative negligence to the jury. Considering first the question of whether the evidence in the record establishes the negligence of Debra, the uninsured motorist, the record reveals that on September 19, 1977, at approximately 5 p.m.,

a collision occurred between the automobiles driven by Florence and Debra as set out earlier in this opinion. Florence testified that she was traveling north on 90th Street in the curb traffic lane at a speed of 30 to 35 m.p.h., and that there was other traffic to the left of her and she did not see Debra's automobile until it hit her. The actual speed limit in effect at that location does not appear in the record, but the record strongly suggests that Florence was not exceeding the speed limit at the time.

Debra testified that she was traveling south on 90th Street and that she was generally familiar with the streets in that vicinity. She stated that she entered the southbound left turn lane with the intent of crossing the northbound lanes to go to a Kentucky Fried Chicken restaurant on the east side of 90th Street. She further testified as follows:

"Q. As you were stopped there in this traffic lane, what was your understanding as to how many traffic lanes there were for northbound traffic? A. Well, I at the time had thought that was the only lane of traffic. Q. As you sat here on the 19th of September, waiting to make your turn, you thought there was a left turn lane and one through traffic lane and that was all on 90th Street? A. Right. Q. After the gentleman signaled you to go, what happened? A. Well, I got halfway into my turn and I ran into the car of Florence Lane. Q. Which of these traffic lanes did the accident occur in? A. It actually occurred in the far righthand lane. . . . Q. Did you see the Lane vehicle at all prior to impact? A. No, I didn't. . . . Q. As you were executing this turn were you looking on to the south up 90th Street in the direction from which cars may come? A. I don't think I was looking up south, I was looking more or less straight ahead of me."

On cross-examination, Debra testified as follows: "Q. Well, Debra, you don't claim that Mrs. Lane did anything wrong, do you? A. No, I'm not saying that. Q. You never have claimed that? A. I know I'm at

fault." However, on motion of the defendant, the latter remark was stricken by the court as not responsive.

It seems clear that under the facts of this case Debra was clearly guilty of negligence in several other respects. As driver of the left turning automobile, Debra was required by statute not to turn her vehicle to the left unless and until such movement could be made with reasonable safety. Neb. Rev. Stat. § 39-652 (Reissue 1978). In doing so, she was also required by statute to yield the right-of-way to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard. Neb. Rev. Stat. § 39-636 (Reissue 1978). We have also held that a motorist must see what is in plain sight. *Davis v. Spindler*, 156 Neb. 276, 56 N.W.2d 107 (1952); *Caldwell v. Heckathorn*, 176 Neb. 704, 127 N.W.2d 182 (1964). Moreover, it is established law that a driver who fails to see another who is favored over him is guilty of negligence as a matter of law. *Schanaman v. Ramirez*, 206 Neb. 212, 292 N.W.2d 39 (1980); *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976). There is little doubt that the evidence in the record established negligence on the part of Debra, or that reasonable minds would have found otherwise.

Defendant contends, however, that the trial court should have submitted the issue of Florence's contributory negligence to the jury. We conclude that the evidence clearly establishes that Florence was not negligent in the operation of her vehicle and that she was struck broadside by the car driven by Debra, who was attempting to make a left turn across the northbound traffic lanes. The facts and law cited in *Oberhelman v. Blount*, 196 Neb. 42, 241 N.W.2d 355 (1976), are in many respects similar to the facts and law involved in the instant case, and the language and reasoning of *Oberhelman* is persuasive. In the instant case, the plaintiff was as innocent a victim as was

the plaintiff in *Oberhelman*, and the uninsured motorist was as patently guilty of negligence by objective proof as was the defendant in *Oberhelman*. In *Oberhelman*, the defendant alleged that Oberhelman was negligent in six respects, to wit, (1) that he failed to keep a proper lookout; (2) that he failed to keep his vehicle under proper control; (3) that he drove at a high and dangerous rate of speed that was not commensurate with the conditions of the roadway or the condition of the traffic then existing; (4) that he failed to yield to defendant his half portion of the highway; (5) that he failed to yield the right-of-way to the defendant; and (6) that he failed to slow down, stop, or swerve his vehicle or take other means at hand to avoid the collision. This court ruled against all six of defendant's contentions, and found Oberhelman was not guilty of contributory negligence, stating at 48, 241 N.W.2d at 359:

"Having concluded that there was insufficient evidence to sustain an affirmative finding of contributory negligence on any one of the six specifications upon which the court instructed the jury, we find that the submission of plaintiff's contributory negligence and comparative negligence was error, which was not cured by the verdict for the plaintiff because the jury was thereby allowed to compare negligence and thus reduce the damages due plaintiff. Such error is therefore prejudicial.

"The finding of negligence on the part of defendant which proximately caused the collision is abundantly supported by the record."

Likewise, in the instant case, we conclude that the trial court acted properly in not submitting the issue of comparative negligence to the jury, and had no alternative but to direct a verdict in favor of Florence on the issue of liability.

We next consider defendant's contention that the trial court erred in overruling defendant's motion for a directed verdict on the issue of the causal connec-

tion between the accident and plaintiff's alleged injury to her right knee because of plaintiff's failure to adduce competent medical testimony stated in terms of the reasonable medical certainty as to that fact; also that the trial court erred in failing to instruct the jury that the plaintiff had the burden of proving the causal relationship between the alleged injury and the accident to a reasonable medical certainty by direct and competent testimony of competent medical experts. Defendant in this case relies heavily upon the testimony of a Dr. Bowman, an orthopedic surgeon in Omaha, who succeeded his former partner Dr. Max Kinney who originally treated Florence after the accident. Dr. Kinney was subsequently killed in a airplane accident, and Dr. Bowman testified at the trial in his place, both from Dr. Kinney's notes and records and from his own examination and consultation with Florence. Dr. Bowman testified at the trial, and in response to the question put to him on direct examination, "Doctor, can you state to a reasonable degree of medical certainty that the right knee complaints which she has as of her last visit, are related to the accident of September 19, 1977?" he replied, "Only by history. I have no other reason to think so, other than the fact that she told me so, and she told me so a year after the accident or something." However, Dr. Bowman also testified at the trial as follows: "Q. Doctor, did you determine whether or not there would be any permanent residuals as a result of this bruising of the knee and soft tissue strain to the back? A. Yes, I did. Q. What did you determine to be the nature of that, of that permanent involvement? A. It was my opinion that she had some permanent impairment of her neck, of five per cent; I think that would include the lumbar spine. Actually neck and lumbar spine. So it's really a permanent impairment of the spine of five percent, *and of her right knee* of seven per cent." (Emphasis supplied.)

Notwithstanding that Dr. Bowman testified that

he could not state to a reasonable degree of medical certainty that the injury to Florence's right knee, which she complained of, was related causally to the accident of September 19, 1977, he did testify from Dr. Kinney's notes. Dr. Bowman was asked: "Q. On the reports that Dr. Kinney had provided you, would you have any reason to doubt anything Dr. Kinney would say in those reports? A. No. Q. In early March of 1978, that visit, that Mrs. Lane made with Dr. Kinney, did Dr. Kinney make mention of whether or not she had complaints of both of her knees? A. Yes, he did. Q. What was that notation? A. She complains of both knees hurting her. Q. And given the fact that, again assuming that she was in an accident on September 19, would it be fair to assume that in early March of '78 the pain above her knees was related causally to the accident of September 1977?

. . . .

"THE WITNESS: Yes."

Florence also testified that when she was first sent to Dr. Kinney she complained of problems with her back and knees, stating: "My right knee was the one that had the cuts on them [sic], and my left knee was numb." Her husband, William J. Lane, also testified at the trial that when he got her home from the hospital he noticed her knees were cut open and she could hardly walk.

Defendant complains that the medical evidence with reference to the injury to Florence's right knee did not use the magic words "reasonable medical certainty." Although it is generally stated that medical testimony must be given with "reasonable medical certainty," we have been unable to find any Nebraska case which specifically so states. It has frequently been held that medical testimony couched in terms of "possibility" is not sufficient, although when such testimony is in terms of "probability" it is sufficient. We have held that "reasonable certainty" and "reasonable probability" are one and the same thing. In

Marion v. American Smelting & Refining Co., 192 Neb. 457, 460-61, 222 N.W.2d 366, 368-69 (1974), we stated:

"Plaintiff devotes several pages of his brief to an attempt to determine whether this court has moved away from the rule of establishing causation to the degree of reasonable certainty to a more liberal rule of establishing causation to a degree of reasonable probability. Actually, this is a distinction without a difference.

"In Welke v. City of Ainsworth (1965), 179 Neb. 496, 138 N.W.2d 808, we defined 'probably' as 'reasonably; credibly; presumbly; in all probability; so far as the evidence shows; and, very likely.' We suggested that on many occasions in the past we had said 'an award of compensation in a workmen's compensation case may not be based on possibility, *probability*, or speculative evidence,' and suggested that a review of those cases indicated that the decisions would have been the same in every instance if we had merely said the award '"may not be made on possibilities or speculative evidence."'

"We further suggested that in the area of certain disabilities, it is impossible for a reputable doctor to testify with absolute certainty that one cause and one cause alone is the reason for the disability. Absolute certainty is not required. Medical diagnosis is not that exact a science. Even though in most instances a certain result may follow, to be accurate the medical expert hedges by the use of the word 'probably.' A review of the cases since Welke v. City of Ainsworth, *supra*, demonstrates that reasonable certainty and reasonable probability mean exactly the same thing when used in medical testimony."

We also note that the new Nebraska Evidence Rules, with reference to testimony by experts, do not require that medical experts testify "with reasonable certainty." The test would seem to be whether their specialized knowledge will assist the trier of fact to

understand the evidence or to determine a fact in issue. Neb. Rev. Stat. § 27-702 (Reissue 1979) provides as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Likewise, Neb. Rev. Stat. § 27-703 (Reissue 1979) provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

In light of what we have stated above, we believe that the foundation for the medical testimony given in this case with reference to the injuries to Florence's right knee was sufficient, and also the fact that it was the result of the accident in question. The evidence presented a question of fact for resolution by the jury, and the jury did so. On appeal, it is not the province of the Supreme Court to weigh and resolve conflicts in the evidence or weigh the credibility of the witness; these functions are for the trier of fact. *Commodity Traders, Inc. v. Palmer*, 203 Neb. 667, 280 N.W.2d 49 (1979); *Mustion v. Ealy*, 201 Neb. 139, 266 N.W.2d 730 (1978).

Finally, the defendant contends that the trial court committed error by instructing the jury that it was limited in returning a verdict, if any, in an amount not to exceed $45,000. Defendant claims that this instruction was prejudicial. The record reveals, however, that counsel for the defendant made no objection to the allegedly prejudicial instructions at the instruction conference. In fact, the record reveals that both parties stipulated to the court, in front of the jury, that there were three policies of insurance totaling

$45,000 in uninsured motorist coverage. At no time during the instruction conference or at trial did counsel object to the court's proposed instructions, although ample time and opportunity to examine the instructions and interpose such an objection was presented defense counsel. This court has held that when a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given. *Exchange Bank of Gibbon v. Ashley*, 191 Neb. 259, 214 N.W.2d 632 (1974); *Swearingen v. Sloggett*, 189 Neb. 482, 203 N.W.2d 442 (1973). Our review of the instructions given in this case indicates that they fairly submitted the issues to the jury. Instructions must be taken as a whole and construed together, and where the instructions covered the issues and fairly submitted the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous. *Hayes v. Anderson Concrete Co., Inc.*, 186 Neb. 771, 186 N.W.2d 477 (1971); *Schmidt v. Knox*, 191 Neb. 302, 215 N.W.2d 77 (1974).

Counsel for the plaintiff has cross-appealed to this court, alleging that the award of $5,000 in attorney fees made by the trial court for his services to the plaintiff was inadequate. He filed his application for an attorney fee under Neb. Rev. Stat. § 44-359 (Reissue 1978), and a separate hearing was held before the trial judge subsequent to the return of the verdict by the jury. Plaintiff's attorney testified that he had a contingent fee contract with the plaintiff for one-third of the amount of her recovery. He argued that the policy behind the legislation awarding attorney fees in actions brought against an insurance company upon a policy issued by them was to make the plaintiff whole, and not to penalize the successful party by requiring the payment of attorney fees out of her recovery. Plaintiff's counsel argues, therefore, that he should be entitled to an attorney fee award under the foregoing section in sufficient amount as to leave the plaintiff the gross amount of her recovery awarded

by the jury, which in this case amounted to $28,450. Plaintiff's counsel has cited no legislative history of the statute in question which bears out his statement with reference to the alleged purpose of the act, nor have we been able to find such an expression of intent.

In its order awarding plaintiff the sum of $5,000 as attorney fees, the trial court cited the case of *Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co.*, 197 Neb. 605, 250 N.W.2d 239 (1977), for the proposition that the reasonable sum allowed as an attorney fee under the statute to a beneficiary suing to collect insurance proceeds has no relation to the fee contracted for on a contingency basis. However, an opinion by this court rendered in *Prucka v. Papio Nat. Resources Dist.*, 206 Neb. 234, 292 N.W.2d 293 (1980), issued after the order of the trial court with reference to the fee for plaintiff's attorney, states that the court *may consider* the actual agreement existing between a litigant and his attorney, including an obligation to pay a contingent fee, particularly if such contract is customary in the locality. The opinion further provides that while the actual agreement is neither the sole factor nor a factor to be given any greater weight than any of the other factors, it may, nevertheless, be considered. However, in the earlier case of *Schimonitz v. Midwest Electric Membership Corp.*, 182 Neb. 810, 157 N.W.2d 548 (1968), which case involved the award of an attorney fee under Neb. Rev. Stat. § 76-720 (Reissue 1976), which deals with eminent domain proceedings, this court stated: "However, we do not interpret the reference in section 76-720, R.R.S. 1943, to a reasonable fee to mean a contingent fee. The fee contemplated by this section is one that is reasonably compensatory for the services rendered. There is no showing in the record of the time spent by counsel in preparation for trial or otherwise. The record indicates a trial of 2 days duration. Any fee allowed must be based on an estimate of the time and preparation required for

the record before us." *Id.* at 816, 157 N.W.2d at 552.

In the instant case, at the hearing for the allowance of the fee to be awarded to plaintiff's attorney, as well as in his brief on appeal, the plaintiff's attorney testified and stated that he did not keep any time records in this case, and generally speaking did not keep time records. In the present case, we cannot say that the award of the attorney fee determined by the trial court after a hearing on the matter was unreasonable or an abuse of discretion. However, we note that a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will only interfere to correct a patent injustice where the allowance is clearly excessive or insufficient. *Omaha Paper Stock Co. v. California Union Ins. Co.*, 200 Neb. 31, 262 N.W.2d 175 (1978). While the record reveals that able counsel for the plaintiff in this case conducted the litigation with great skill, and the results of his efforts reflect his diligence and ability, as well as the time devoted in the preparation and trial of the case, nevertheless we are unable to state that the fee awarded him by the trial court was not a reasonable fee, and hence we affirm the judgment of the trial court in that regard. There can, of course, be little question that the plaintiff's attorney is entitled to recover on his contingent fee contract with his client in the amount of one-third of the recovery in the amount of $28,450, or a total of $9,483. The trial court awarded a fee of $5,000, leaving a balance remaining of $4,483. The manner and source from which plaintiff's attorney collects the balance due him is not a matter for this court to decide, but is strictly a matter between the attorney and his client. However, we award plaintiff an attorney fee for services in this court in the amount of $2,000.

No errors appearing in the record, we conclude that the judgment of the District Court must be, and hereby is, affirmed.

AFFIRMED.

CLINTON, J., dissents.

HASTINGS, J., concurring.

I concur in the result reached by the majority today. The requirement of one or two lawsuits in uninsured motorist cases presents no problem of any deep philosophical significance, and I would prefer to opt for a rule of simplicity and general acceptance.

However, in applying the rule announced today, I believe that it is essential to require any such trial to be bifurcated so as to avoid the complications resulting from one jury trying to decide tort liability and damages on the one hand and the contract liability of the insurance company as well.

E. ARLENE OEHLRICH, PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN E. OEHLRICH, DECEASED, APPELLEE, V. GATEWAY REALTY OF COLUMBUS, INC., A CORPORATION, APPELLANT.

308 N.W.2d 327

Filed July 10, 1981. No. 43363.

1. **Brokers.** A broker earns his commission and becomes entitled thereto when he produces a purchaser who is ready, able, and willing to purchase at a price and upon terms specified by the principal or satisfactory to him.
2. **Contracts: Principal and Agent.** If a contract contemplates that an agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency.
3. **Summary Judgment.** Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, and where under the facts the moving party is entitled to judgment as a matter of law.
4. **Contracts: Questions of Law.** When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such contract is a question of law.

Appeal from the District Court for Platte County: WILLIAM H. NORTON, Judge. Affirmed.

Patrick A. Brock for appellant.

Raymond E. Baker of Baker & Beck for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and WOLF and BURKHARD, District Judges.

BURKHARD, District Judge.

This is an action for an accounting for the payment of real estate commissions which E. Arlene Oehlrich, personal representative of the estate of Herman E. Oehlrich, deceased, appellee, claims are owing under the terms of an employment contract between the decedent, hereinafter called Oehlrich, and Gateway Realty of Columbus, Inc., appellant, hereinafter called Gateway.

The trial court granted a partial summary judgment in favor of Oehlrich for listing commissions regarding two pieces of property, one being a farm owned by Richard Triba and the other being a residential property owned by Charles Allphin. The judgment was in the amount of $1,970.10 and costs in the amount of $70.20. Gateway's motion for new trial was overruled, and this appeal was then taken. We affirm.

Gateway assigns as error that (1) the District Court erred and abused its discretion in determining that there were no genuine issues of material fact; (2) the District Court erred in finding that it was the intent of the parties that Oehlrich was entitled to real estate commissions on all business finalized by him regardless of when the commissions were collected or earned; (3) the judgment was not sustained by sufficient evidence and is contrary to the evidence; (4) the judgment is contrary to the law; and (5) the District Court erred in not finding that the real estate commissions were earned after Oehlrich's death and had not accrued prior to his death pursuant to the terms of the employment contract.

Gateway, as a real estate broker, operates a general

real estate business in the city of Columbus, Nebraska, and as such, in the course of its business, procures listings of real estate for sale to prospective purchasers thereof. On January 3, 1977, Gateway and Oehlrich entered into a written contract of employment whereby Oehlrich would act as a real estate salesman pursuant to the terms of the employment contract. As part of his duties under the employment contract, Oehlrich was to use his best efforts to sell, lease, or rent real estate listed with Gateway and to solicit additional listings for Gateway in connection with Gateway's real estate business. Oehlrich was to be paid on a commission basis.

The employment contract provided for commissions to be divided between Gateway and Oehlrich when collected, and provided that when commissions were collected from the party or parties for whom the service was performed Gateway was to hold the commissions in trust for Oehlrich. It also provided that such division and distribution of commissions should take place as soon as practicable after the collection of any such commissions.

Oehlrich's commission as a listing salesman under his contract of employment was 27½ percent of the total commission.

While under the employ of Gateway and while the employment contract was in full force and effect, Oehlrich obtained real estate listings on behalf of Gateway, two of which are the subject of this appeal. One was a farm listing contract executed on behalf of Gateway by Oehlrich for the sale of a farm owned by Richard Triba, with the listing dated August 30, 1976, and effective until March 1, 1977. The other one was a residential listing contract executed on behalf of Gateway by Oehlrich involving the Charles Allphin property, with the listing contract dated October 11, 1976, and effective until January 11, 1977, but subsequently extended to February 11, 1977. On February 7, 1977, Oehlrich died. Thereupon, following Oehlrich's death, the Triba property was sold by a Gateway Realty of

Omaha agent on February 11, 1977, to Norval Augustin. Then, on February 22, 1977, the Allphin property was sold by the Nebraskaland Allied Agency of Columbus, Nebraska, to R. E. Valsnik. Both of these properties were thus sold through other brokers and agents by means of the multiple listing service within the real estate community. Eventually, upon the closing of these transactions, Gateway as the listing broker was paid a commission as to both the Triba property and as to the Allphin property, even though the Allphin property was sold after the expiration date of the listing contract.

Paragraph 4 of the employment contract provides in part as follows: "When the Salesman shall perform any service hereunder, whereby a commission is earned, said commission shall, when collected, be divided between the Broker and Salesman, in which division the Salesman shall receive a proportionate share as set out in the Broker's 'commission schedule' in effect at the time such commission is earned, and the Broker shall receive the balance." Gateway contends that a commission was not earned by Oehlrich as a result of the two listings. Gateway asserts, and rightfully so, that a broker earns his commission and becomes entitled thereto when he produces a purchaser who is ready, able, and willing to purchase at a price and upon terms specified by the principal or satisfactory to him. *Wisnieski v. Coufal*, 188 Neb. 200, 195 N.W.2d 750 (1972). We are concerned here, however, not with a selling salesman but with a *listing* salesman. Oehlrich had done all that was required of him to earn a commission as a listing salesman when he obtained the two listings. He himself did not have to produce a ready, able, and willing purchaser. He just had to wait for the property to be sold and for Gateway to receive its commission, which was done, in order to collect his commission.

Paragraph 7 of the employment contract provides as follows: "This contract and the association created hereby, may be terminated by either party hereto at any

time upon notice given to the other; but the rights of the parties to any commission which accrued prior to such notice shall not be divested by such termination." This is the only provision in the contract pertaining to termination of the contract. It seems clear, obvious, and fair that if termination of the contract under paragraph 7 did not divest Oehlrich of any rights to a commission which accrued before a notice of termination, then he was not divested of, and did not lose, those rights if termination of the contract were brought about by other means, such as his death.

If a contract contemplates that an agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency. 3 C.J.S. *Agency* § 343 (1973).

In the instant case, Oehlrich's rights to a commission had accrued prior to his death, because, upon his obtaining the Triba and Allphin listings, such rights arose, became vested, and came into existence, even though the commission would not be payable until the property was sold and the commission collected.

Paragraph 11 of the employment contract provides as follows: "This Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, executors, personal representatives, estate, successors and assigns." From this paragraph, it is clear that the parties intended that the personal representative of any deceased party would have the benefit of the contract. The contract was a personal service contract, and the only conceivable benefit which could pass to the personal representative would be the right to receive funds due Oehlrich under the contract. Paragraph 11 clearly indicates that the intent of the parties was not to terminate payment of commissions to an agent by virtue of the death of the agent.

Summary judgment may be properly granted where there exists no genuine issue as to any material fact in

the case, and where under the facts the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979).

When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such contract is a question of law. *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 129 N.W.2d 581 (1964).

There exists no genuine issue as to any material fact in the record of the instant case. The summary judgment which precipitated this appeal relates only to listing commissions relative to the Triba and Allphin property. There is no dispute that the employment contract existed, that Oehlrich performed a service under the contract when he obtained the two listings, that the two listings he obtained eventually were sold, and that a commission was paid to Gateway as a result of the sale of the two listings. Oehlrich did all that was required of him to entitle him to a commission as listing agent. His rights, upon his death, passed to his personal representative.

The assignments of error of appellant are without merit. The judgment of the trial court is affirmed.

AFFIRMED.

HONSTEIN TRUCKING, A PARTNERSHIP CONSISTING OF STEVEN E. HONSTEIN AND HARRY HONSTEIN, APPELLEE AND CROSS-APPELLANT V.
SANDHILLS BEEF, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE.

308 N.W.2d 331

Filed July 10, 1981. No. 43456.

1. **Threshers' Liens.** The purpose of the thresher's lien law is to give notice by statute to all prospective purchasers of grain and to the owners thereof within 30 days after the completion of combining of the possible existence of a lien by the person who combined the grain.

2. ____. The purpose of the thresher's lien statute is to protect the rights to payment of the combiner who is not a party to the payment arrangements between the seller of the grain and the purchaser.
3. ____. The thresher's lien statute is remedial in nature and requires a liberal construction.
4. **Threshers' Liens: Replevin.** The thresher's lien statute gives to the holder of a thresher's lien the rights of enforcement given to owners of secured interests in property as outlined in Neb. U.C.C. art. 9 (Reissue 1971), including the right to bring an action in replevin.
5. **Threshers' Liens.** Where one commingles property subject to a lien with other property alike in quality and value, the lien is not extinguished so long as there is on hand sufficient property alike in quality and value to satisfy the lien.
6. **Trial: Appeal and Error.** In a trial to the court in a law action, the findings of facts by the trial court have the force and effect of a jury verdict and will not be set aside unless clearly wrong.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellant.

Winner, Nichols, Meister & Douglas for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

Appellant, Sandhills Beef, Inc., appeals from an order of the District Court for Scotts Bluff County, Nebraska, ordering it to deliver to appellee, Honstein Trucking, 4,477.92 cwt. of corn or, in the alternative, to pay appellee the value of such corn, which the court found to be $17,240. Appellee, a commercial combiner of grain, sued the appellant, a corporation that engages in extensive cattle feeding operations, in replevin to recover 10,956.52 bushels of corn against which the appellee claimed a thresher's lien under the terms of Neb. Rev. Stat. §§ 52-501 to 52-503 (Reissue 1978). The District Court found that the lien was timely filed and notice given; that the corn combined and delivered by appellee to appellant was commingled with other corn in appellant's feedlot and that appellant had on hand

at all times pertinent more than 10,956.52 bushels of corn; and that appellee has a valid lien on 4,477.92 cwt. of corn and is entitled to delivery of that amount of corn or its monetary value of $17,240.

Appellant appeals, assigning as error that the District Court erred (1) in finding that replevin was a proper remedy under §§ 52-501 et seq.; (2) in finding that the lien attached to the corn in the appellant's hands when the notice of lien was both filed with the county clerk and served on the appellant after the sale and delivery of the corn; (3) in failing to find that delivery of the corn to the appellant shifted the claimed lien from the corn to any purchase price remaining in the appellant's hands; (4) in finding that the specific corn was commingled and that the lien attached to other than the specific corn; and (5) in failing to find that the claimed lien expired when the specific corn was consumed by livestock prior to delivery of notice of lien to appellant. Appellee cross-appeals, assigning as error the District Court's calculations as to the amount of the lien. We affirm the District Court's findings and judgment in all respects.

The case arose when one Chuck Meyer entered into a contract with the appellee to combine 1,260 acres of corn at $20 per acre. Part of the corn was to have been stored at Meyer's farm and the remainder was to be hauled to market. Ultimately, all of the corn was sold instead to the appellant for delivery to the appellant's feedlot. The combining of the corn started in mid-November 1979 and finished on December 8, 1979. Before the appellee began delivery to the appellant, Meyer received from the appellant the sum of $100,000. The value of the corn at the time of the delivery was $4.10 per hundredweight. A total of 1,145 tons of corn were delivered. On January 4, 1980, less than 30 days from the date that the combining was completed, the appellee filed with the county clerk of Scotts Bluff County notice of a thresher's lien pursuant to § 52-501, and the notice was mailed to the appellant by U.S. mail

on January 8, 1980. This notice, received by the appellant on January 9, 1980, was the only notice, oral or written, given to the appellant of a claimed thresher's lien. However, appellant's manager admitted that by mid-November 1979 he knew appellee was doing the combining for Meyer. The corn when delivered to appellant was either piled in an open silage pit or immediately processed and fed to the appellant's cattle. The appellant was receiving other corn during the time that the appellee was delivering Meyer's corn, the corn was substantially commingled, and at all times there were at least 10,195 bushels of corn in the silage pit. Appellee received $5,000 in partial payment from Meyer, but a dispute arose between Meyer and the appellant as to a balance due Meyer from appellant. Any balance due and owing Meyer from the appellant has not been paid and is the subject of litigation between those parties.

Section 52-501 essentially provides that the owner of a combine used in combining grain shall have a lien upon such grain or corn which he shall combine for either the agreed amount or the reasonable value of the combining services; and to perfect said lien he shall file in the office of the county clerk of the county where the combining was done a notice of the lien, which notice shall designate (1) the name of the person for whom the combining was done; (2) the amount due for the services; (3) the amount covered by the lien; (4) the place where the grain or corn is located; and (5) the date on which the combining was done. The notice shall be filed within 30 days after the combining is done. In the event the grain is to be sold, it is the duty of the seller to notify the purchaser that the combining bill has not been paid. The statute then provides that in the event the corn is sold or consigned with the consent or knowledge of the party entitled to a lien thereon within 30 days after the date of such combining, the lien shall not attach to the grain or to the purchase price thereof unless the party entitled to the lien shall notify the purchaser in writing of the lien. The statute further provides that the lien may be

foreclosed in the manner and form provided for the foreclosure of secured transactions as provided in Neb. U.C.C. art. 9 (Reissue 1971), and that said foreclosure shall be instituted within 30 days after the filing of the lien. Section 52-502 provides, in effect, that the lien shall not attach to the corn in the hands of an innocent purchaser unless all the notices provided for in § 52-501 shall have been given. It is essentially the position of the appellant that the lien is not effective as against it because it was an innocent purchaser for value, which took delivery and paid for the grain without notice of any lien, and that the lien is not retroactive to the date on which the threshing was commenced. It is clear from the record, and not disputed by the parties, that the appellee's lien was filed with the county clerk and notice given to the appellant by the appellee within 30 days after the completion of the combining of Meyer's corn, although, admittedly, subsequent to the purchase of and payment for the grain by the appellant. Further, it is clear that by mid-November appellant's manager knew appellee was combining the corn for Meyer. Although there are no cases in Nebraska interpreting the lien statute to guide the court, the exact situation has been presented to other courts under statutes substantially similar to that in Nebraska. In *Mitchell v. Elevator Co.*, 15 N.D. 495, 107 N.W. 1085 (1906), an action was brought to recover damages against the defendant elevator for the conversion of grain on which the plaintiff claimed a thresher's lien. The defense was that since the lien was not on file at the time the grain was purchased, although the purchase was made within 30 days of the time of the threshing, the defendant was an innocent purchaser. Section 4824, R.C.C. (1899), the North Dakota statute then in effect, provided: "Any person entitled to a lien under this chapter, shall within thirty days after the threshing is completed, file * * * a statement in writing * * * showing the amount and quantity of grain threshed * * * and a description of the land upon which the grain was grown." Section 4825 provided:

"Such lien shall have priority over all other liens and incumbrances upon such grain." The court, in a holding for the plaintiff, said: "To construe this statute so that purchasers of the grain during the 30 days could purchase it without liability, would defeat the purpose of it to a great extent. The intention of the legislature clearly was to subject the grain to a lien for the threshing during the 30 days and this lien became enforceable upon the filing of the claim during the 30 days.... After the filing of claim for a lien, the lien exists as a matter of law against all liens or claims. The statute deprives the purchaser of nothing. He gets all that the owner had a right to sell to him. He knows as a matter of law that the owner cannot lawfully sell, except subject to the lien of the thresher, if it develops that he has any. The statute is notice to the purchaser of the right to a thresher's lien on the grain, up to 30 days from the threshing.... The defendant bought the grain with notice which was as effectual as though the statement for a lien was on file. He acted at his peril, and the statute deprives him of no constitutional or vested right of property." *Mitchell v. Elevator Co., supra* at 500-01, 107 N.W. at 1086-87. *Hahn v. Sleepy Eye Milling Co. et al.*, 21 S.D. 324, 112 N.W. 843 (1907); *Blank v. Fenton*, 54 N.D. 837, 211 N.W. 590 (1926). See, also, generally, 3 Am. Jur. 2d *Agriculture* § 14 (1962); 3 C.J.S. *Agriculture* § 122 (1973).

The sole and only purpose of the thresher's lien law was to give notice by statute to all prospective purchasers of grain and to the owners thereof within 30 days after the completion of combining of the possible existence of a lien by the person who combined the grain. The appellee did not waive that right by delivering the grain nor did he violate any rights of the appellant by failing to inform it at the time of delivery. Appellant's assignment manager knew at the time of delivery that the corn was being combined by appellee for Meyer. In addition, appellant was engaged in a business which involved purchasing large quantities of grain, some of it harvested by custom combiners.

Having been in such a business for years, appellant hardly fits the image of an innocent purchaser, unaware of the thresher's lien statute and the attendant business risks. The assignment is without merit.

Appellant next argues that the District Court erred in failing to find that delivery of the corn to appellant shifted the claimed lien from the corn to any purchase price then remaining in the hands of the appellant. However, in the present case, appellant claims that it paid Meyer $100,000 for the corn in advance of the combining. Whether there is any purchase price remaining in the hands of the appellant is the subject of a pending lawsuit between appellant and Meyer. To construe the statute as appellant wishes would force appellee to await the outcome of that lawsuit and, thus, defeat the entire purpose of the thresher's lien statute. The purpose of the lien is to protect the right to payment of the combiner who is not a party to the payment arrangements between the seller of the grain and the purchaser. Allowing the purchaser to escape the effect of the statute merely by paying the seller in advance would remove the protection now granted the combiner by the statute. This court has previously held that the mechanic's lien law, Neb. Rev. Stat. § 52-101 et seq. (Reissue 1978), is remedial in nature and requires a liberal construction. *Peters v. Halligan*, 182 Neb. 51, 152 N.W.2d 103 (1967). The same principle of construction applies to the thresher's lien. Thus, the trial court was correct in finding that the lien here attached to the corn, and this assignment of error is without merit.

Appellant also raises the issue of whether replevin is an appropriate remedy for the enforcement of a thresher's lien under § 52-501. Section 52-501 gives to the holder of a thresher's lien the rights of enforcement given to owners of secured interests in property as outlined in Neb. U.C.C. art. 9 (Reissue 1971). Section 9-503 states as follows: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done

without breach of the peace or may proceed by action." Under the plain terms of article 9, the action in replevin, which is essentially to regain possession of goods, is provided for and plainly granted to the appellee. The assignment of error is without merit.

Appellant's final assignment of error suggests that the corn delivered to it was, in fact, destroyed by being fed to the appellant's cattle prior to the time the lien was filed and, therefore, the lien did not attach. The evidence indicates that the corn delivered to the appellant was commingled with other corn and that at all times there was on hand in the silage pit where the grain was stored a sufficient quantity of corn to respond to the judgment of the court. Generally, where one commingles property subject to a lien with other property alike in quality and value, the lien is not extinguished so long as there is on hand sufficient property alike in quality and value to satisfy the lien. See *First Nat. Bank v. Morgan*, 172 Neb. 849, 112 N.W.2d 26 (1961). See, also, generally, 66 Am. Jur. 2d *Replevin* § 8 (1973); 77 C.J.S. *Replevin* § 13 (1952). This assignment of error is without merit.

On cross-appeal, the appellee assigns as error that the trial court failed to allow the full recovery of which it claims to be $20,200, contending that the contract was an indivisible contract to combine Meyer's corn for $25,200, rather than a contract to combine 1,260 acres at $20 per acre. In this factual question, there was evidence which would support the trial court's findings that appellee actually combined only 1,112 acres and that the contract was divisible. In a bench trial in a law action, the findings of fact by the trial court have the force and effect of a jury verdict and will not be set aside unless clearly wrong. *Lee v. City of Omaha*, *ante* p. 345, 307 N.W.2d 800 (1981). Here, the findings of the trial court are supported by the evidence and, thus, the assignments of error are without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF GREYHOUND LINES, INC. AMERICAN BUS LINES, INC., DOING BUSINESS AS TRAILWAYS, INC., APPELLANT, V. GREYHOUND LINES, INC., APPELLEE.

308 N.W.2d 336

Filed July 10, 1981. No. 43457.

1. **Motor Carriers: Proof.** The burden is on the applicant for a certificate of public convenience and necessity to show he has met all the requirements of the statutes.
2. **Public Service Commission: Appeal and Error.** Upon an appeal from an order of the commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
3. ____:____. This court will not disturb an order of the commission based on evidence unless the evidence shows that the order was unreasonable or arbitrary.
4. **Motor Carriers.** In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest.
5. ____. In considering a determination of the public convenience and necessity, the utility of a "closed door" policy and the value of a competitive market to the public must be considered.
6. ____. The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it.
7. **Public Service Commission.** The determination of the public interest is one that is peculiarly for the determination of the commission.
8. **Public Service Commission: Judgments.** If there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary and capricious.

Appeal from the Nebraska Public Service Commission. Affirmed.

Lavern R. Holdeman of Peterson, Bowman & Johanns for appellant.

James E. Ryan of Ryan & Williams, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This is an appeal from an order of the Nebraska Public Service Commission granting an application filed by Greyhound Lines, Inc., for authority to operate as a common carrier by motor vehicle, over regular routes, transporting passengers, baggage, mail, express, and newspapers in the same vehicle with passengers between Lincoln, Nebraska, and Grand Island, Nebraska, serving no intermediate points, via Interstate 80. Grand Island, Nebraska, is approximately 100 miles west of Lincoln, Nebraska.

A protest was filed by American Bus Lines, Inc., doing business as Trailways, Inc., which has authority to operate over the same route. No other protest to the application was filed. After 6 days of hearings on the application in Lincoln and Grand Island, the commission concluded, with one commissioner dissenting, that the application of Greyhound should be granted. Trailways appeals from that order.

The protestant holds authority to operate over U.S. Highway 34 between Lincoln and Grand Island, serving all intermediate points. The applicant holds authority to operate over U.S. Highways 30 and 30A between Omaha and Grand Island, and also over U.S. Highway 6 between Omaha and Lincoln. In 1962 the applicant applied for authority to operate between Lincoln and Grand Island serving no intermediate points. The authority was granted by the commission but upon appeal to this court the order was reversed. See *The Greyhound Corp. v. American Buslines Inc.*, 178 Neb. 9, 131 N.W.2d 664 (1964).

Since the applicant is authorized to operate over Interstate 80 as an alternate route, it now operates buses through Omaha to Lincoln, Grand Island, and points west, and also in the opposite direction, but without authority to convey passengers to Lincoln from

the west, or from Lincoln to the west. This "closed door" service requires eastbound passengers from Grand Island to travel to Omaha and then return to Lincoln if they wish to use the applicant's service to Lincoln. Westbound passengers must first travel to Omaha and then return to Lincoln in order to use the applicant's service to Grand Island. The same restrictions apply to the applicant's express package service between Lincoln and Grand Island.

In *Black Hills Stage Lines, Inc. v Greyhound Corp.*, 174 Neb. 425, 118 N.W.2d 498 (1962), it was noted that a closed door passenger operation is difficult for waiting passengers to understand and may at times result in wasteful transportation. That circumstance is present in this case because the applicant is already providing the service but the "closed door" restriction prevents the public from using the service without traveling to or from Omaha in order to use the applicant's service between Lincoln and Grand Island. As the assistant director of traffic for Greyhound stated: "The crux of Greyhound's proposal, and the purpose of this entire application, is simply to allow Greyhound to serve Lincoln, Ne. as an intermediate point stop on its operations over Interstate Highway 80. Greyhound simply wants to open its doors to provide service to Lincoln, Ne." An application for the type of certificate involved in this case is governed by Neb. Rev. Stat. § 75-311 (Reissue 1976), which provides: "A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing *that the applicant is fit, willing, and able properly to perform the service proposed,* and to conform to the provisions of sections 75-301 to 75-322.01 and the requirements, rules, and regulations of the commission thereunder and that the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or property, *is or will be required by the present or future public convenience and necessity;* other-

wise such application shall be denied." (Emphasis supplied.)

The burden is on the applicant for a certificate to show he has met all the requirements of § 75-311. See *The Greyhound Corp. v. American Buslines Inc., supra.*

Upon an appeal from an order of the commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made. *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 186 Neb. 261, 182 N.W.2d 648 (1971). This court will not disturb an order of the commission based on evidence unless the evidence shows that the order was unreasonable or arbitrary. *The Greyhound Corp. v. American Buslines Inc., supra; Preisendorf Transp., Inc. v. Herman Bros., Inc.*, 169 Neb. 693, 100 N.W.2d 865 (1960).

The record shows that the applicant Greyhound proposes to operate 3 eastbound and 2 westbound schedules daily over Interstate 80 between Grand Island and Lincoln. The buses on this route are all air-conditioned and lavatory-equipped. Terminal facilities and commission agents are already present in the areas involved in the application. All Greyhound buses now operating through Lincoln have excess capacity to accommodate additional passengers. Financial information provided by the company shows it is financially fit, willing, and able to perform the service applied for.

The evidence clearly supports the commission's finding that Greyhound was fit, willing, and able to perform the proposed service. The appellant Trailways attacks the commission's finding that the certificate "is or will be required by the present or future public convenience and necessity." "This court has consistently held: 'In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by ap-

plicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest.' Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N.W.2d 265. See, also, Houk v. Peake, 162 Neb. 717, 77 N.W.2d 310; Basin Truck Co. v. R.B. 'Dick' Wilson, Inc., 166 Neb. 665, 90 N.W.2d 268." *Black Hills Stage Lines, Inc., v. Greyhound Corp.*, 174 Neb. 425, 429, 118 N.W.2d 498, 500-01 (1962).

More than 50 public witnesses testified in support of Greyhound's application, taking up over 600 pages of the record. The witnesses included representatives of local government subdivisions in the affected area, chamber of commerce representatives, officials from the universities, businessmen engaged in package delivery, retired citizens' organizations, and private individuals. While much of the testimony was repetitive, the consensus of the witnesses' testimony described Trailways' service as inadequate with regard to its schedules. Most of the witnesses cited a need for more and better schedules and service.

The package express shippers generally expressed a dissatisfaction with the lack of daytime schedules on Trailways. One shipper went so far as to describe the present service as "no bus service at all." Incidental complaints were also registered with regard to the failure to notify customers on the arrival of packages.

The lack of daytime schedules was cited by individuals who used Trailways to travel to western Nebraska to visit relatives, or return on visits from school. The facilities of Trailways in many cities are closed during most of the scheduled stops. No witness appeared in opposition to the application other than the area operations manager for Trailways.

The evidence before the commission indicated a marked reduction by Trailways in schedules between Lincoln and Grand Island since 1962. At the time of the hearing, Trailways' Lincoln to Grand Island service departed Lincoln at 5:20 p.m. and 11:15 p.m., and arrived

in Grand Island at 7:45 p.m. and 1:10 a.m., respectively. From Grand Island, Trailways buses departed at 5:25 a.m. and 7:05 p.m., and arrived in Lincoln at 7:35 a.m. and 9:20 p.m., respectively. These schedules were part of Trailways' transcontinental system which serves major markets on the east and west coasts. Two of Greyhound's proposed schedules between Lincoln and Grand Island would provide daytime service.

The Greyhound representative testified there would be no significant impact on Greyhound's "northern" route if the application for service to Lincoln over Interstate 80 was granted.

The Trailways' operations witness noted that Trailways was not a profitable operation over the route covered by the application. The witness estimated that if the Greyhound application was granted, $84,000 in revenue would be diverted to Greyhound from Trailways.

The "closed door" restriction which applied to Greyhound's interstate service to Lincoln was suspended by the Interstate Commerce Commission in 1979 for 90 days ending September 25. Trailways' operations witness was unable to provide evidence of a significant diversion of traffic from Trailways to Greyhound as a result of the lifting of the restriction during suspension.

The commission, while noting that some revenue diversion would result from its order granting the application, found that it would not impair Trailways' operations contrary to the public interest. The commission found a public need for additional bus schedules, as provided for in Greyhound's application. In granting the application, the commission described the history of Trailways' deteriorated schedule as "tantamount to an abandonment of service by Trailways over that route."

In considering a determination of the public convenience and necessity, the utility of a "closed door" policy and the value of a competitive market to the public must be considered. This court has noted: "'The purpose of the Nebraska Motor Carrier Act was regulation

for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall.'" *Shanks v. Watson Bros. Van Lines*, 173 Neb. 829, 833, 115 N.W.2d 441, 444-45 (1962); *Black Hills Stage Lines, Inc. v. Greyhound Corp.*, 174 Neb. 425, 118 N.W.2d 498 (1962).

Trailways argues that this court's decision in *The Greyhound Corp. v. American Buslines Inc.*, *supra*, should control this appeal. In that case, however, we noted there was no substantial showing of insufficiency of capacity or lack in quality of service by American, and that the evidence disclosed preponderantly that the facilities of American were good and the operating conditions satisfactory.

The commission, in its order, distinguished that earlier decision when it found a lack of quality service by Trailways and operational facilities that were not good. The finding of the commission in this regard is supported by the record.

The evidence in this case shows that the authority applied for will serve a useful purpose that is responsive to a public demand and need. It also shows that the service will not be adequately performed by the existing carrier in the area. The determination as to whether the service to be performed by the applicant would endanger or impair the operations of the existing carrier contrary to the public interest was an issue peculiarly for the commission. *Black Hills Stage Lines, Inc. v. Greyhound Corp.*, *supra*. It was the duty of the commission to weigh the need for new service and the detriment to accrue to the existing carrier, and to determine what was consistent with the public interest.

The determination of the public interest is one that is peculiarly for the determination of the commission. If

there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary and capricious. *Neylon v. Petersen & Petersen, Inc.*, 181 Neb. 143, 147 N.W.2d 488 (1966).

The findings of the commission are supported by the record and its order must be affirmed.

AFFIRMED.

IN RE INTEREST OF LEE HOLLEY, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
HAROLD HOLLEY ET AL., APPELLANTS.
IN RE INTEREST OF JENNIFER HOLLEY, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
HAROLD HOLLEY ET AL., APPELLANTS.

308 N.W.2d 341

Filed July 10, 1981. Nos. 43649, 43650.

1. **Parental Rights.** The interest of the state which is protected by Neb. Rev. Stat. § 43-209 (Reissue 1978) is that of protecting minor children from serious abuse and serious neglect.
2. ____. The interest of the state protected by Neb. Rev. Stat. § 43-209 (Reissue 1978) is a compelling state interest.
3. ____. The word "may" in Neb. Rev. Stat. § 43-209 (Reissue 1978) is designed to allow the judge to weigh each individual case in the light of the degree of seriousness of the conduct, its effect upon the best interests of the child, the likelihood of continuation, and the results of attempted corrective measures, and then to determine whether or not parental rights must be terminated. Such discretion is not constitutionally impermissible.
4. ____. Rules governing termination of parental rights are intended to recognize the integrity of the family and to bring about parental termination only when that appears to be required and no other reasonable alternative exists.
5. ____. Courts have the discretion to experiment with foster care and visi-

tation arrangements while keeping in mind that there is a compelling state interest to be protected and that the best interests of the child may require complete termination of parental rights eventually.

Appeal from the Separate Juvenile Court of Lancaster County. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Marie Ashe for appellants.

Ron Lahners, Lancaster County Attorney, and Richard J. Hautzinger for appellee.

Darrell K. Stock, guardian ad litem.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal from the separate juvenile court of Lancaster County from an order terminating the parental rights of the appellants, Ann and Harold Holley, in their children, Lee and Jennifer Holley. The termination order was entered May 28, 1980, pursuant to the provisions of Neb. Rev. Stat. § 43-209(5) (Reissue 1978). After trial, the court found that both Ann and Harold Holley were unable to discharge their parental responsibilities because of mental illness in the case of Ann, and mental deficiency in the case of Harold, and that in the case of both appellants such conditions would continue for a prolonged and indeterminate period. Appellants' motions for new trial were overruled and they have perfected this appeal. They assign as error: (1) That the trial court erred in overruling their motion to dismiss; and (2) That the trial court erred in failing to find § 43-209 constitutionally defective by its claimed failure to require the showing of a compelling state interest to justify termination, and by its claimed failure to require that the State pursue the least restrictive alternative means to achieve the compelling state interest.

The older child, Lee Holley, was born on July 20, 1977. On July 22, 1977, an amended petition was filed

alleging that Lee Holley was without proper parental care and support through no fault of his parents, in that the parents of the child are emotionally unstable and unable to provide proper care for the child. The amended petition alleged that while still in the hospital the mother was heard to state that she did not care if the baby died and that the father had put a blanket over the face of the child while visiting and stated "let him suffocate." After a hearing on this amended petition on July 28, 1977, the trial court ordered the custody of Lee placed with Ethel Louise Paul, paternal grandmother of the child. An adjudication hearing was held on August 9, 1977. Evidence adduced at this hearing indicated that Ann Holley suffered from hallucinations and delusions, had been hospitalized for severe emotional problems three times in the 2½ years preceding the hearing, and was not personally able to assume responsibility for the child's care. Other evidence at this hearing indicated that Harold Holley was also emotionally unstable. After this hearing, the trial court found the child to be a dependent child pursuant to Neb. Rev. Stat. § 43-202(1) (Reissue 1978) and ordered Lee placed in the joint custody of the appellants and Ethel Louise Paul, further ordering that a caseworker from the welfare department was to visit the home, supervise the care of Lee, and to see that the appellants were instructed in parenting skills. The appellants and Lee then moved into the home of Ethel Paul and her husband where they remained until January 1978.

In January 1978 appellants moved into their own apartment and the child remained in the home of Ethel Paul. On March 8, 1978, a further dispositional hearing was held at the request of the appellee. At this hearing Ethel Paul testified that she was no longer physically able to care for Lee, and the appellants recommended that Lee be placed with Glen and Sandy Tubbs, cousins of Harold Holley. The testimony of Ann Holley's psychiatrist at this hearing indicated that Ann was still suffering from hallucinations and delusions and that

she was unable to respond well to stress. It was the testimony of the psychiatrist that Ann Holley would not be able to deal appropriately with the child in an emergency situation and that she was not emotionally capable of caring for the child at that time. The psychiatrist's testimony also indicated that Harold Holley was readily overwhelmed, and his mental condition prevented him from reasoning out how to react to stressful situations. Following this hearing, the trial court ordered Lee placed in an approved foster home that could best meet his needs, and he was placed in the home of Sandy and Glen Tubbs. The court at this hearing also ordered that visitation should be arranged for Ann and Harold Holley and that Ann and Harold should continue to correct the conditions of dependency and neglect found to exist if they desired to resume custody of Lee. The appellants were ordered to follow the recommendations of the welfare department caseworker, visit with Lee, obtain counseling with the Lincoln-Lancaster Mental Health Center, and to cooperate with agencies that could teach them proper child care.

On October 16, 1978, a daughter, Jennifer, was born to the appellants. Appellants immediately signed a voluntary foster-care agreement to place Jennifer in foster care. The child, Jennifer, was placed in the home of Bob and Sandy Rosecrans and visitations were arranged. On January 3, 1979, a petition was filed with the juvenile court of Lancaster County requesting an adjudication and alleging that Jennifer was without proper parental care and support through no fault of the parents due to the voluntary foster placement. At a hearing on this petition on January 10, 1979, the court found that Jennifer was a dependent child within the meaning of § 43-202(1) and that temporary custody of Jennifer should be placed with the Lancaster County Division of Public Welfare.

On August 10, 1979, appellee filed supplemental petitions with regard to both Lee and Jennifer request-

ing that the appellants' parental rights in the children be terminated. The petitions alleged that the parents were unable to care for the children even after months of instruction by workers from the Lancaster County Division of Public Welfare; that the parents were mentally and emotionally incapable of assuming the responsibility of caring for the children; that they were unable to discharge parental responsibilities because of mental illness or mental defects; and that the conditions would continue for a prolonged, indeterminate period. After numerous continuations, the termination hearing was held on May 21, 1980. The evidence adduced at this hearing indicated that the emotional and mental problems of Ann Holley had not improved. Her psychiatrist, Dr. J. Boman Bastani, testified that stress would accelerate Ann Holley's illness and that she was in no position to handle the stress of parenting due to her mental illness. Testimony at this hearing indicated that Harold Holley was 100 percent physically disabled by an arthritic condition which will not improve and will probably worsen. Testimony by an orthopedist, Dr. Harold R. Horn, indicated that Harold's disability was such that he could not respond if the child was in danger. Psychiatric and intellectual evaluations of Harold indicated that he is mildly mentally retarded and is functioning at around the fifth grade level, emotionally and intellectually.

Dr. Robert G. Osborne, a psychiatrist, testified that Harold's concept of parenting was analogous to that of a child playing house and that he demonstrated a lack of continuity and consistency in caring for the children. Dr. Osborne testified that it was his opinion that Harold Holley would be unable to teach the children the necessary social skills and that his inability would be lifelong.

At this hearing, the most damaging testimony came from Scott Kerl, a caseworker with the Lancaster County Division of Public Welfare, from Carol Christopher of Child Protective Services, Margaret Reid, a social service worker, and Janis Houfek of

Homemakers' Services from the division of public welfare. These witnesses testified that the Holleys had been extremely uncooperative with all the services offered by the division of public welfare and had made very little progress in basic parenting skills such as feeding and changing the children. The evidence at this hearing further indicated that the parents were unable or unwilling to discipline the children, particularly in dangerous situations such as playing with electrical cords or playing near a fan. There was evidence from several witnesses that on many of the visits when the Holley children were brought to the Holleys' apartment to visit them, Harold Holley refused to get out of bed and come out into the living room and visit with the children. There was also testimony that the children were frightened of Harold and Ann and that there were no demonstrations of affection running from the children to their parents. Following this hearing, the trial court found that the best interests of the children, Lee and Jennifer, required termination of the appellants' parental rights. We affirm.

We will first consider appellants' assignment of error that § 43-209 is unconstitutional. Appellants first argue that their right to due process is violated by that statute in that it fails to require a compelling state interest to justify termination of parental rights. Appellants rely heavily on the case of *Alsager v. District Court of Polk Cty., Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975), in which the U.S. District Court for the Southern District of Iowa held that "to sustain its compelling interest burden, the state must show that the consequences, in harm to the children, of allowing the parent-child relationship to continue are more severe than the consequences of termination." *Id.* at 23. Appellants' argument is that by not requiring a showing of actual or imminent harm to the child before termination of parental rights may take place, § 43-209 does not require a compelling state interest to be shown before parental rights may be terminated.

We note that the circumstances of this case are greatly different than those which were present in the *Alsager* case. While the District Court in its opinion in *Alsager* did not marshal the evidence which was presented in the juvenile court, the opinion does set out the Iowa statute under which the parents' rights were terminated. We note that the Iowa statute did not contain a reason for termination similar to subsection (5) of § 43-209 under which appellants' parental rights were terminated. Subsection (5) of the Nebraska statute allows the court to terminate parental rights when it finds that: "The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period." It is plain from the wording of the Nebraska statute, as was noted by the separate juvenile court in its memorandum opinion, that the statute by its terms does not permit termination of parental rights for any mental illness or mental deficiency. The only mental illness or mental deficiency which will suffice to terminate parental rights under this subsection is that which renders the parent unable to discharge parental responsibilities, and it is also necessary that the court find reasonable grounds to believe that the condition will continue for a prolonged, indeterminate period. Thus, it is plain that the statute ties the mental problems of the parent to the parent's ability to properly raise and care for the child. While the statute does not, as appellants would require, use the magic words "actual or imminent harm to the child," it is neither necessary nor even appropriate that the statute be so worded. The interest of the state, which is protected by this statute, is, as we noted in the case of *State v. Metteer*, 203 Neb. 515, 522, 279 N.W.2d 374, 378 (1979), "protecting minor children from serious abuse and serious neglect . . . ." This manner of wording the interest to be protected makes the interest no less compelling than it would be were the statute worded as

appellants argue it ought to be.

Even assuming for the sake of argument that the statute's literal wording does not state a compelling state interest, the federal court in the *Alsager* case noted that a facially defective statute can be saved by "a state court construction restricting the vague standards to constitutionally permissible bounds." 406 F. Supp. at 19. The construction which was placed on § 43-209(5) by the case of *State v. Metteer, supra,* is such a limiting construction. Therefore, we find that the statute of which appellants complain does protect a compelling state interest and is thus not unconstitutional in that respect.

Appellants next argue that the statute, even if it protects a compelling state interest, is unconstitutional in that it fails to require that the state pursue the least restrictive alternative means to achieve such compelling interest. However, appellants fail to note that the statute in question does not require termination of parental rights when a parent is found to be within subsection (5) of the statute. As we state in *State v. Metteer, supra* at 521, 279 N.W.2d at 378: "The word 'may' in the statute is designed to allow the judge to weigh each individual case in the light of the degree of seriousness of the conduct, its effect upon the best interests of the child, the likelihood of continuation, and the results of attempted corrective measures, and then to determine whether or not parental rights must be terminated. Such discretion is not constitutionally impermissible."

In addition, in *In re Interest of Hill,* 207 Neb. 233, 239, 298 N.W.2d 143, 146 (1980), this court stated that rules governing termination of parental rights "are intended to recognize the integrity of the family and to bring about parental termination only when that appears to be required and no other reasonable alternative exists."

There is nothing in the Nebraska termination statute which prevents a court from devising unique foster care

and visitation arrangements when it finds that such would be in the best interests of the child, as opposed to total termination of parental rights. See Derdeyn, Rogoff, & Williams, *Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care*, 31 Vanderbilt L. Rev. 1165 (1978). While the statute may not set out a "checklist" of alternative arrangements to be attempted in an effort to find the one that best suits the best interests of the child, the *Hill* and *Metteer* cases make it plain that complete termination of parental rights is indeed a last resort and that courts have the discretion to experiment with foster care and visitation arrangements while keeping in mind that there is still a compelling state interest to be protected, and that the best interests of the child may require complete termination of parental rights eventually.

It is clear from the record in this case that the separate juvenile court did terminate appellants' parental rights as a last resort, and that prior to termination that court authorized a variety of experimental situations to assist appellants in gaining the necessary parenting skills which would have allowed them to regain custody of their children. However, the record is replete with evidence that after 2½ to 3 years of intensive instruction, visitation, and mental health counseling, appellants were unable to master even the most basic skills of diapering and feeding the children. In addition, the record demonstrates that the visitations arranged by the social workers between appellants and their children were not successful in terms of developing an affectionate child-parent relationship between the Holleys and their children. The record demonstrates that the children, Lee and Jennifer, were frightened of the Holleys; that many times Harold Holley refused or was unable to get out of bed to visit with the children; that neither Harold nor Ann understood the emotional needs of the children; and that many times the appellants were more interested in visiting with the adults who brought the children to the Holley apartment than

in playing with the children. The record also demonstrates that the appellants were unable to understand the seriousness of certain situations which posed a danger to the children and were unable or unwilling to protect or discipline the children to prevent the occurrence or reoccurrence of such situations. The record is clear that the separate juvenile court then did terminate appellants' parental rights only as a last resort to protect the best interests of the minor children, Lee and Jennifer Holley.

Appellants' final contention is that the trial court erred in finding that it was shown by clear and convincing evidence that termination of appellants' parental rights was in the best interests of the children. As we said in *State v. Logan*, 204 Neb. 204, 281 N.W.2d 753 (1979), on appeal, while this court is free to hear the case de novo on the record, the findings of fact by the juvenile court should be accorded great weight because the juvenile court heard and observed the parties and the witnesses. A review of the record shows that the findings of fact by the trial court were not in error. Appellant Ann Holley suffered from delusions and hallucinations and had been diagnosed as suffering from chronic undifferentiated schizophrenia by more than one psychiatrist. These hallucinations and delusions prevented her from dealing with the real world and prevented her from learning proper parenting skills. The record also shows that appellant Harold Holley was 100 percent physically disabled and, in addition, was functioning at only a fifth or sixth grade level intellectually and was unable to grasp the concepts necessary to be able to raise the children properly. In addition, his physical disabilities would have made it impossible for him to remove the children from dangerous situations in an emergency. The evidence also demonstrated, as the trial court found, that in all probability the parents' mental problems would continue for a prolonged and indefinite period and that it was unlikely they would ever be able to regain custody of their children. Tragi-

cally, we find no evidence in the record which would indicate that it would be in the best interests of the minor children, Lee and Jennifer Holley, to allow the appellants to maintain a "residue of visitation rights" as counsel for the appellants urges.

Therefore, we find that the order of the separate juvenile court of Lancaster County terminating appellants' parental rights to their children, Lee and Jennifer Holley, was correct in all respects, and we affirm that order.

AFFIRMED.

CERES FERTILIZER, INC., A COLORADO CORPORATION, APPELLANT, V.
FRED O. BEEKMAN, APPELLEE.

308 N.W.2d 347

Filed July 10, 1981. No. 43754.

1. **Uniform Commercial Code: Secured Transactions: Judgments.** The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a security interest under the Uniform Commercial Code given to secure its payment.
2. **Secured Transactions: Attachments.** Upon dissolution of an attachment, ordinarily all property attached should be returned to the defendant owner.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed as modified.

Joseph M. Caffall and Fredrick L. Swartz for appellant.

James G. Sharp of Everson, Noble, Wullschleger, Sutter, Sharp & Korslund for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Ceres Fertilizer, Inc., has appealed from an order and judgment on the mandate of the District Court for Gage County which directed that funds held by the clerk of the District Court be paid to Fred Beekman's assignees. The funds had been held pursuant to an attachment which had been determined to be invalid upon appeal to this court in *Ceres Fertilizer, Inc. v. Beekman*, 205 Neb. 768, 290 N.W.2d 199 (1980). The appellant assigns as error: (1) The trial court's finding that by bringing suit on the note, plaintiff had made an election of remedies and therefore precluded future reliance upon the security agreement; (2) The holding that Ceres had no lien against the funds held by the clerk of the District Court; and (3) The order that those funds be paid to Beekman's assignees.

As was set forth in detail in our previous opinion, Beekman had executed a promissory note in favor of Ceres which was secured by a security agreement and financing statement which recited that it covered certain of Beekman's corn then being stored in Chase County. Ceres commenced its action on the note against Beekman in the District Court for Gage County, and in conjunction with that lawsuit had an attachment issued to Chase County which was levied against the proceeds from the sale of the allegedly secured corn. By order of the District Court for Chase County, those funds were transmitted to the clerk of the District Court for Gage County. Beekman's motion to dissolve the attachment was denied by the District Court for Gage County, and after trial a money judgment was entered against Beekman on the promissory note. On appeal, we found that the attachment was improperly obtained and therefore ordered it dissolved. However, jurisdiction did not depend upon the attachment because of the defendant's general appearance, and following an examination of the record on the merits, we affirmed the money judgment in favor of Ceres.

This court's decision was filed on March 18, 1980, in which we remanded the cause for proceedings con-

sistent with our determination that the attachment placed upon Beekman's property was invalid. On March 21, 1980, Fred Beekman made two assignments. One assignment was to Thomas J. Beekman for 50 percent of all money held by the clerk of the District Court for Gage County which is his property, and the other assignment was to his attorney, Arnold Wullschleger, for the other 50 percent of the money held by the clerk. Both assignments were filed with the clerk of that court on the same date.

The District Court held a hearing on the issues remanded, and entered its order and judgment on the mandate as follows: The judgment against Beekman in favor of Ceres on the promissory note, in the amount of $48,415.60, with interest, was affirmed. The order of attachment was dissolved. The funds held by the clerk of the District Court for Gage County were to be paid as follows: (1) To the United States of America Internal Revenue Service, the sum of $3,774.23, plus interest and penalties; and (2) The remainder of the funds to be paid one-half to Arnold E. Wullshleger and one-half to Thomas J. Beekman, pursuant to the assignments.

The court made the finding that Ceres had no claim to the funds by virtue of the judgment awarded or by virtue of any security agreement executed by Beekman. The court stated that Ceres had elected to sue upon the promissory note in lieu of asserting any rights under the security agreement and, by virtue of said election, Ceres' rights now accrue from that judgment and Ceres may not assert claims under that security agreement. The court further held that Ceres did not have a lien based upon the judgment itself.

The first assignment of error concerns the ruling that plaintiff had made an election of remedies by suing on the note and therefore could not now rely on the security agreement for a first lien. Neb. U.C.C. § 9-501(1) (Reissue 1971) states: "(1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as

limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in section 9-207. *The rights and remedies referred to in this subsection are cumulative.*" (Emphasis supplied.)

The above section has been consistently interpreted to mean that a creditor may choose to sue on a promissory note and recover judgment on an underlying debt without losing his rights and remedies to recover on the security agreement. *Matter of Hill*, 472 F. Supp. 844 (D. Kan. 1979).

"The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a mortgage or other lien given to secure its payment. This Court has held that the creditor is not deprived by the judgment of his right to resort to a fund, or to avail himself of a lien or security held for the debt." *Ruidoso State Bank v. Garcia*, 92 N.M. 288, 290, 587 P.2d 435, 437 (1978).

The remedies are cumulative and a creditor need not choose one remedy to the exclusion of the others. "The Code, and pertinent judicial decisions, established that a secured creditors [sic] need not 'elect' his choice of remedies. He may pursue those methods of collection afforded under the Code or through judicial processes otherwise available. Nor by effectuating the latter course of action, does the creditor relinquish any rights obtained by virtue of his security interest." *Bilar, Inc. v. Sherman*, 40 Colo. App. 38, 41, 572 P.2d 489, 491-92 (1977). See, also, *Cracco v. Cox*, 66 App. Div. 2d 447, 414 N.Y.S.2d 404 (1979).

Therefore, by suing on the note and recovering a judgment, Ceres has not foreclosed its rights which arise from the security agreement. The trial court was in

error in holding that the doctrine of election of remedies applies here to preclude claims under any security agreements.

Ceres complains in its second assignment of error of the finding by the trial court that plaintiff had no lien against the funds being held by the court. It seems beyond argument that no lien existed by reason of the money judgment. "All . . . goods and chattels of the debtor, shall be bound [for the satisfaction of a judgment] from the time they shall be seized in execution . . . ." Neb. Rev. Stat. § 25-1504 (Reissue 1979). No execution has as yet been issued.

However, the court in its findings went further and concluded that "plaintiff has no claim . . . by virtue of . . . any security agreement heretofore executed by the defendant . . . ." It is apparent that such a finding was based on the court's theory that Ceres had made an election of remedies which we have already declared to be incorrect.

Neb. U.C.C. § 9-306 (Reissue 1971) provides that in spite of the sale or other disposition by the debtor of the collateral, the security interest may continue in such property and in any identifiable proceeds received by the debtor. It is also true that where funds are obtained by the unauthorized sale of goods subject to a security interest, a transferee of the proceeds of such sale may be liable to the secured party. *Alter v. Bank of Stockham*, 53 Neb. 223, 73 N.W. 667 (1897).

In light of these authorities, the possibility remains that Ceres has a security interest in the funds even though they be the subject of a written assignment. However, that issue was not presented to the court by either the pleadings or the evidence and so remains unresolved.

Under the state of the record now existing, the District Court was correct in directing the return of the funds in the hands of the clerk to the defendant or his assignees. Upon dissolution of an attachment, ordinarily all property attached should be returned to the defend-

ant. 7 C.J.S. *Attachment* § 369 (1980). There is no question but that Beekman was the owner of the proceeds of the sale of the corn and Ceres, at most, claimed rights as a secured creditor. "We are still of the opinion that the trial court had no choice but to order the repayment of the proceeds of the attachment sale to the tenant-appellee because at that time and *under the pleadings and evidence in the case* before said court, the tenant was the owner of the crops and the landlord merely a lienholder thereof." (Emphasis supplied.) *Barnes v. Burke*, 47 Ala. App. 253, *opinion denying rehearing* at 263, 253 So. 2d 46, 56 (1970), *cert. granted and aff'd* 287 Ala. 725, 253 So. 2d 56 (1971).

Except to the extent that the District Court was in error in deciding the issue of the efficacy of any lien arising from the security agreement, Ceres' second and third assignments of error are without merit, and the judgment is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. DAVID D. DITTER, APPELLANT.

308 N.W.2d 350

Filed July 10, 1981. No. 43815.

1. **Appeal and Error: Jurisdiction.** Filing of a notice of appeal in this court vests exclusive jurisdiction in this court.
2. **Criminal Law: Motions for New Trial: Appeal and Error.** In the absence of a motion for new trial in a criminal case, the only issues remaining for argument are whether the pleadings support the judgment and whether the judgment is excessive.
3. **Motions for New Trial.** A motion for new trial filed while the case is on appeal to this court is a nullity.

Appeal from the District Court for Hall County: JOHN C. WHITEHEAD, Judge. Affirmed in part, and in part dismissed.

L. William Kelly of Kelly & Kelly for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

WHITE, J.

This case comes to the court in a unique posture. A number of procedural and substantive questions as to our jurisdiction are raised by the State. Because of the jurisdictional defects, we have before us only the question of whether the sentence imposed on the defendant was excessive.

The defendant, David D. Ditter, pled guilty to the crime of first degree murder, Neb. Rev. Stat. § 28-303(1) (Reissue 1979), and was sentenced on November 15, 1979, after a hearing by the trial court on the aggravating and mitigating circumstances, to a term of imprisonment for life, the least sentence allowable under § 28-303.

No motion for new trial was filed and a notice of appeal was filed on December 13, 1979.

Notwithstanding the notice of appeal filed in this court, vesting exclusive jurisdiction in this court, new counsel on May 19, 1980, filed pleadings denominated motion for new trial and motion to vacate verdict and request for new trial. See *State v. Allen*, 195 Neb. 560, 239 N.W.2d 272 (1976). The pleadings alleged various infirmities in the process of the plea and sentence of constitutional dimension. The motion was not verified as is required by Neb. Rev. Stat. § 29-3001 (Reissue 1979) of the Nebraska Post Conviction Act. Nevertheless, the court proceeded to a hearing, made findings of fact, and denied the relief. A second notice of appeal was filed and the entire matter is before the court.

It is settled law in this state that in the absence of a motion for new trial in a criminal case, the only issues remaining for argument are whether the pleadings support the judgment and whether the sentence is

excessive. *State v. Kelley*, 198 Neb. 805, 255 N.W.2d 840 (1977). The pleadings support the judgment, and the sentence is clearly not excessive. The trial court could not impose a lesser sentence than the one imposed.

The second motion for new trial, in addition to not being timely filed, was filed while the matter was on appeal to this court. It was a nullity. See *State v. Allen*, *supra*.

As to the motion to vacate, counsel asks us to waive compliance with the requirements of our Post Conviction Act. We decline to do so, both for the purpose of adhering to the plain terms of the Post Conviction Act and so that, should he so desire, defendant may avail himself of the terms of that act to provide this court with an adequate record to review the alleged errors of constitutional dimension.

We affirm the judgment of the trial court insofar as the claim that the sentence was excessive and dismiss so much of this appeal as purports to be an appeal from denial of post conviction relief.

AFFIRMED IN PART, AND IN PART DISMISSED.

CARYL SUE KOCARNIK, APPELLANT, V. JOHN CHARLES KOCARNIK, JR., APPELLEE.

308 N.W.2d 352

Filed July 10, 1981. No. 43860.

1. **Child Custody.** When a controversy arises between the natural parents as to the custody of minor children, no presumption shall exist that one parent is more fit to have custody of the children than the other.
2. **Motions for New Trial: Evidence.** In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant, and material and with relation to a material issue, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.
3. **Alimony: Property Division: Appeal and Error.** A judgment of the

trial court fixing the amount of alimony or making distribution of the property will not be disturbed on appeal in the absence of an abuse of discretion.

4. **Attorney Fees: Costs.** The award of attorney fees and the taxing of costs is discretionary with the District Court.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

David L. Herzog for appellant.

James A. Hogan for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Caryl Sue Kocarnik, appeals from a decree entered by the District Court for Douglas County, Nebraska, on October 7, 1980. The decree specifically dissolved the marriage between the appellant and her husband, John Charles Kocarnik, Jr., appellee herein. Further, the order provided that the custody of the minor children of the parties, James Murry Kocarnik and Regina Lynn Kocarnik, be awarded to the father, John Charles Kocarnik, Jr., subject to broad reasonable rights of visitation by appellant mother. The order awarded no alimony to appellant and granted to appellee the family home, together with all the household goods and furniture located in the family home, subject to any mortgage or encumbrance which appellee was to assume, and further subject to a $6,000 lien in appellant's favor, to be paid upon the occurrence of certain events. It is apparent that appellee father was awarded the home in order to raise the minor children. The order further divided certain other properties of the parties and ordered appellee to pay to appellant the sum of $3,000 in monthly installments and an additional $750 to apply upon appellant's attorney fee.

Appellant has assigned numerous errors alleged to have been committed by the trial judge. The two most significant errors assigned appear to be that the trial

court erred in granting the custody of the minor children to the appellee father and in not granting to appellant a new trial based upon newly discovered evidence. We have now examined those specific assignments of error, as well as the other assignments raised by appellant, and conclude that none of the assignments are meritorious. The judgment of the trial court is therefore affirmed in all respects.

The facts of the case are not particularly unique or different from the hundreds of other domestic relations cases coming before the courts today. The parties, each in their early thirties, had been married approximately 10 years. As a result of the marriage there have been two minor children born to the parties, a son 10 years of age and a daughter 6 years of age at the time of trial. Both of the parties are employed during the day and both of them would require some outside assistance in caring for the children during the day. Each of the parties consumed a considerable amount of time at trial leveling charges and countercharges concerning each other's fitness to have custody of the children. In some respects the testimony may have been counterproductive. Little purpose would be served in repeating those charges except to exacerbate an already strained situation. Upon conclusion of the trial, after hearing all the evidence and speaking to both of the children in the presence of counsel, the court concluded, as we would conclude, both parties were fit and proper to be the custodial parent of the minor children of the parties, although the court noted that appellant's conduct in many respects was unwise and questionable. We would agree with that conclusion as well. The trial court concluded, however, that "considering all of the testimony and the interviews with the minor children of the parties, and considering particularly the manner and feeling evidenced by the testimony of each of the parties as heard and observed by this Court, the best interests of the minor children of the parties are better served by awarding the care, custody, and control of the minor

children to [appellee] subject to reasonable visitation rights more specifically referred to elsewhere in this Decree." We have reviewed the bill of exceptions in detail, as we are required to do in cases of this nature, and have concluded from our reading that the evidence regarding the custody of the children supports the conclusions reached by the trial court. Reviewing the record de novo, we reach the same conclusions as did the trial court concerning the custody of the children.

Appellant argues that absent the court's finding that she is unfit, she is entitled to preference with regard to custody of the minor children. Whatever may have heretofore been the rule, the passage of the so-called "no-fault" divorce statutes in this state has eliminated any presumption that a mother has greater rights to the custody of minor children than the father. In *Kockrow v. Kockrow*, 191 Neb. 657, 662, 217 N.W.2d 89, 92 (1974), we said: "As we interpret our no-fault divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other." Likewise, in *Kringel v. Kringel*, 207 Neb. 241, 244, 298 N.W.2d 150, 153 (1980), we said: "We have also stated the general rule to be that, when a controversy arises between the natural parents as to the custody of minor children, no presumption shall exist that one parent is more fit to have custody of the children than the other."

Furthermore, while we do review the case before us de novo, we cannot ignore the fact that the trial court had the opportunity of viewing all the parties, including the children whom he interviewed in the presence of both counsel for the parties. Specifically, in *Curfman v. Curfman*, 207 Neb. 1, 3-4, 295 N.W.2d 299, 301 (1980), we recently said: "'In determining the question of who should have the care and custody of minor children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.

"'In any custody determination, the discretion of the trial court in such a situation is necessarily subjective and must be founded to a significant extent upon its observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the children. It also must necessarily be prospective in nature.

"'Equity cases are heard de novo in this court; however, in determining the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.'"

Our examination of the record fails to disclose to us any evidence that the trial court, in any manner, committed error or abused its discretion regarding the custody of the children. To the contrary, as already noted, we reach the same conclusions as did the trial court. It was clear that either party may have effectively fulfilled the obligation of a parent. There was, however, sufficient evidence to indicate that, on balance, the best interests of the children opted in favor of a finding that their custody should be with the appellee father. The assignment of error is overruled.

Turning then to the second principal assignment of error raised by appellant, that the trial court erred in failing to grant the appellant a new trial because of newly discovered evidence, we likewise must reject that claim.

It appears from the record that the newly discovered evidence would be testimony of a psychologist to the effect that granting custody of the children to the father instead of the mother would not be in the children's best interests. That, in no manner, constitutes newly discovered evidence as defined by our laws, even if it was relevant. The question of custody of the children was always one of the issues in the lawsuit. Appellee, in his answer, specifically requested that he have the care, custody, and control of the minor children. Much of the testimony adduced during the course of the trial made it

clear that appellee was seeking the care, custody, and control of the minor children. If appellant and appellant's counsel were not mindful of that fact, either by reason of the answer filed by appellee or the evidence offered at trial, they must of necessity have been aware of the potential that the court would grant custody of the children to the appellee when, in the presence of both counsel, the court inquired of the children with whom they wished to live. Appellant made no effort to offer the evidence of the psychologist even at that point and before the court entered the decree. To now contend that counsel was unaware that custody of the children might be granted to the appellee, and therefore could not have produced evidence to show what the effect of such an order would be, is to totally ignore the state of the record and the true purpose of the "newly discovered evidence" rule.

In *Pence v. Liermann*, 191 Neb. 614, 616-17, 216 N.W.2d 746, 747-48 (1974), this court said: "'In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant, and material and with relation to a material issue, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.'" The evidence offered by appellant in support of her claim for a new trial fails to meet any of the tests set forth in the *Pence* decision. The evidence was neither evidence which could not have been discovered by the exercise of reasonable diligence, nor was it evidence of such a character as to reasonably justify a belief that its admission would probably bring about a different result. Such offered evidence was clearly not within the meaning of the "newly discovered evidence" rule, and the trial court was correct in refusing to grant a new trial

based upon such claim.

Appellant's further assignments of error concerning the trial court's failure to grant alimony and her objection to the distribution of property likewise must be overruled. In *Amen v. Amen*, 207 Neb. 694, 697, 301 N.W.2d 74, 76 (1981), we said: "In determining whether alimony should be awarded, the ultimate test is one of reasonableness. [Citations omitted.]

"Although the rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which division can be determined, the decision rests on the facts in each case and the sound discretion of the trial court. [Citations omitted.]

. . . .

"A judgment of the trial court fixing the amount of alimony or making distribution of the property will not be disturbed on appeal in the absence of an abuse of discretion."

We are unable to say that a reading of the record discloses any abuse of discretion on the part of the trial court regarding either a division of the property or the denial of alimony. Appellant is gainfully employed and will have sufficient funds to maintain herself. Nor is she required to make any contribution to the support of the minor children. It has likewise been ordered that she receive back her share of the contribution made to the family home, as well as certain other contributions. We cannot say that the trial court abused its discretion by failing to grant alimony, and the assignments of error concerning that matter must be overruled.

Finally, appellant contends that the trial court erred in refusing to grant a larger attorney fee. The trial did indeed take several days. An examination of the bill of exceptions, however, raises some serious question as to whether all that was presented to the court might not have been done in less time. Had an effort been made to try the necessary issues in the case, rather than the animosity which existed between the parties, perhaps less

time would have been consumed. As we said in *Ritchey v. Ritchey*, 208 Neb. 100, 105, 302 N.W.2d 372, 376 (1981): "'The award of attorneys' fees and the taxing of costs is discretionary with the District Court.'" Again we find no abuse of discretion.

Having found that the trial court was correct in all respects, the judgment must be affirmed.

AFFIRMED.

KNOELL CONSTRUCTION COMPANY, INC., APPELLEE, V. JAMES A. HANSON ET AL., APPELLANTS.

308 N.W.2d 356

Filed July 10, 1981. No. 43908.

Equity: Appeal and Error. It is the duty of this court on appeal of an action in equity to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the trial court except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief on the matters at issue in the case.

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Affirmed.

Richard G. Kopf of Cook & Kopf, P.C., for appellants.

Steven O. Stumpff of Stumpff & Washburn for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is an action to foreclose a mechanic's lien based upon an express contract for leveling the defendants' land. This is the second appearance of this case in this court. See *Knoell Constr. Co., Inc. v. Hanson*, 205 Neb. 305, 287 N.W.2d 435 (1980). In that case this court af-

firmed the District Court finding that there was an express contract for the sum of $40,000, upon which $28,000 had been paid. The evidence was undisputed that some work remained to be done. The case was remanded to the District Court for the limited purpose of taking evidence and determining how many acres were to be leveled, how many acres remained undone, and the reasonable value of the work remaining to be done.

On remand, additional evidence was taken and the District Court determined that there was never an agreement as to the number of acres to be leveled but the parties did agree on what land was to be leveled. The court found that there were 24 acres left to be leveled and that the reasonable value of performing the work would be $2,880. The District Court gave the defendants credit for the sum of $2,880 in addition to the $28,000 previously paid and entered its decree in the sum of $9,120 in favor of plaintiff, with interest, and foreclosed the mechanic's lien. The defendants have appealed.

At the outset of the trial on remand it was stipulated that the bill of exceptions from the prior trial could be considered by the court without the necessity of recalling the witnesses. The evidence at the former trial was taken without surveys or scale maps or drawings and was confusing in many respects as is indicated in our former opinion. Exhibit 35, a survey map of the land, was used at the rehearing but it is difficult to correlate testimony based on that exhibit to testimony at the first trial. There was a broad agreement as to the general extent of the area to be leveled but a conflict in the evidence as to how many acres that area included. The evidence was directly contradictory as to the number of acres remaining to be done and the reasonable cost of completing the work.

The plaintiff's testimony was that 15 acres of land remained to be completed and that the reasonable cost of the work needed to complete the contract would be

$120 per acre, a total of $1,800. That evidence was corroborated by the testimony of an agricultural engineer. The defendants' evidence was that 41 acres of land remained to be completed and a land leveling contractor testified that the reasonable cost of completing the work on those 41 acres would be $27,675. The defendants also offered evidence that an additional 5 acres remained to be completed and that the reasonable cost of completing that 5 acres would be $3,465. That evidence, however, was excluded by the trial court. At the second trial the District Court also made a personal inspection and observation of the premises.

After trial the District Court found that the work on 24 acres of land remained to be completed and that the reasonable cost of completing the work would be $120 per acre, or $2,880. The District Court therefore gave defendants credit for the sum of $2,880 against the $12,000 remaining to be paid and foreclosed plaintiff's mechanic's lien in the sum of $9,120, plus interest.

The defendants first contend that the findings of fact made by the District Court are not supported by the evidence because there is no specific testimony in the record that 24 acres remain to be completed, and no witness testified that the cost of completing that 24 acres was $2,800. The defendants therefore contend that the findings of fact do not conform to the evidence. The trial court is not required to accept one party's or one witness' version of the facts but is required to reach an independent conclusion as to those facts. This is not a case in which the damages are uncertain, conjectural, and speculative. The trial court was required to reconcile extensive conflicts in the evidence and testimony and to reach a conclusion based upon the evidence. Where it has been proven that damage has resulted and the only uncertainty is the exact amount, it is sufficient if there is evidence from which the amount of the damages can be ascertained with reasonable certainty. *Delp v. Laier*, 205 Neb. 417, 288 N.W.2d 265 (1980).

In the case at bar the trial court had the benefit of a

personal inspection and observation of the premises which are the subject of this action and also saw and heard the witnesses. It is the duty of this court on appeal of an action in equity to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the trial court except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief on the matters at issue in the case. *Engel v. Rhen Marshall, Inc.*, 206 Neb. 265, 292 N.W.2d 307 (1980).

The defendants also assert that the District Court erred in excluding testimony that 46 rather than 41 acres remained to be completed, and that the cost of completing the additional 5 acres would be $3,465. Offers of proof were made, but the District Court excluded the evidence upon the ground that the defendants' testimony at the prior trial constituted a judicial admission that only 41 acres remained to be completed.

Defendants contend that the testimony at the prior trial did not constitute a judicial admission but was, at most, only an evidentiary admission. Whether the defendants' testimony constituted a judicial or an evidentiary admission, the result here is unaffected. The trial court accepted the defendants' testimony at the prior trial as an admission. Whether evidence contradicting such admissions was admitted or excluded on remand, the admissions remained, and the trial court made its factual determinations based on conflicting testimony.

On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. *Gasper v. Moss*, 204 Neb. 24, 281 N.W.2d 213 (1979).

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

LINCOLN TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. COUNTY BOARD OF EQUALIZATION OF THE COUNTY OF YORK OF THE STATE OF NEBRASKA AND COUNTY OF YORK, NEBRASKA, APPELLEES AND CROSS-APPELLANTS.

308 N.W.2d 515

Filed July 17, 1981. Nos. 43343, 43344.

1. **Political Subdivisions: Appeal and Error.** An appeal to the District Court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo.
2. **Taxation: Valuation.** Taxes on tangible property are to be levied by valuation uniformly and proportionately.
3. **Taxation: Valuation: Proof.** The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
4. **Taxation: Valuation.** Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value.
5. ____:____. Tangible property is to be valued at actual value for tax purposes and assessed at 35 percent of actual value; however, an assessment will not be set aside merely because it was not assessed at actual value where property is proportionately valued in a reasonable degree.
6. ____:____. Approximation of value and uniformity is all that can be accomplished and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the federal and state Constitutions is all that is required, and such provisions are satisfied when designed and manifest departure from the rules is avoided.
7. ____:____. In order for a taxpayer to secure a reduction in the assessed value of his property, it must be demonstrated that the assessed value is grossly excessive, or that its value has not been fairly and proportionately equalized.

8. **Rules of Evidence: Expert Witnesses.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Neb. Rev. Stat. § 27-703 (Reissue 1979).
9. **Taxation: Valuation.** For purposes of taxation, actual value, market value, and fair market value are synonymous terms.
10. **Judgments: Appeal and Error.** A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.

Appeal from the District Court for York County: WILLIAM H. NORTON, Judge. Affirmed.

Richard W. Smith and Charles E. Lowe of Woods, Aitken, Smith, Greer, Overcash & Spangler for appellant.

Vincent Valentino, York County Attorney, and Michael J. Murphy for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

These two actions are appeals from the County Board of Equalization (hereinafter board) of York County, Nebraska, denying the protests of the plaintiff, the Lincoln Telephone and Telegraph Company (hereinafter LT&T), by which it sought reductions in the assessed value of its personal property located in York County, Nebraska, for the years 1976 and 1977. For the year 1976, LT&T returned its property at an assessed value of $1,159,566. For the year 1977, it returned its property at an assessed value of $1,482,914. In making this return it used the prescribed Form 10. More will be said about Form 10 when the contentions of LT&T are discussed. By its protests, LT&T asked that the assessed value for 1976 be reduced to $651,676 and for the year 1977 to $829,584. The board denied the protests for both years and, for the year 1976, increased the valuation to $1,420,815.

The two actions were consolidated for trial on appeal to the District Court and are consolidated for briefing and argument in this court.

The District Court reversed the action of the board in increasing the 1976 valuation and affirmed the action in denying the requested reductions. We affirm the judgment of the District Court.

The basis of LT&T's protests to the board was the claim that, although its personal property was returned at 35 percent of its actual value for each of the years in question, real estate in the county was being assessed at 19.67 percent of actual value for the year 1976 and at 19.58 percent of actual value for the year 1977. It asserted, therefore, that it was being taxed discriminatorily in violation of the provision of Neb. Const. art. VIII, § 1, which requires that taxes upon tangible property (with exceptions not pertinent here) shall be levied by valuation uniformly and proportionately. It also asserts that valuation was discriminatory in violation of the equal protection clause of the fourteenth amendment to the U.S. Constitution. See, *Grainger Brothers Co. v. Board of Equalization*, 180 Neb. 571, 144 N.W.2d 161 (1966); *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923). In accordance with the mandate of these two cases, LT&T urges that the valuation of its property be reduced by the difference between 35 percent and the 19.67 and 19.58 percentages earlier mentioned and which represent the sales assessment ratio as determined by its expert witness using data furnished by the Department of Revenue.

Before discussing the evidence in this case and the specific contentions and arguments of the parties, we first state the legal principles of law governing our review and those which are pertinent to a determination of the principal issue which is the question of proportionality.

An appeal to the District Court from action of the county board of equalization is heard as in equity,

and upon appeal therefrom to this court it is tried de novo. *Grainger Brothers Co. v. Board of Equalization, supra; Collier v. County of Logan,* 169 Neb. 1, 97 N.W.2d 879 (1959). Taxes on all tangible property and franchises are to be levied by valuation uniformly and proportionately. *Grainger Brothers Co. v. Board of Equalization, supra.* The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. *Grainger Brothers Co. v. Board of Equalization, supra.* Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value. *Banner County v. State Board of Equalization & Assessment,* 206 Neb. 715, 295 N.W.2d 682 (1980). Tangible property is to be valued at actual value for tax purposes and assessed at 35 percent of actual value; however, an assessment will not be set aside merely because it was not assessed at actual value where property is proportionately valued in a reasonable degree. Neb. Rev. Stat. § 77-201 (Cum. Supp. 1980); *Chicago, R.I. & P.R. Co. v. State,* 111 Neb. 362, 197 N.W. 114 (1923).

A great deal of the record in this case is taken up with evidence, including expert opinion testimony, as to whether the use of the sales assessment ratios determined actual value of the real estate for tax purposes in this particular case. The testimony of the board's witnesses tended to show, for a variety of reasons, that the sales assessment ratio was not an indicator of market value. The evidence of LT&T tended to establish that the sales assessment ratio was a valid indicator of market value in this case. Considerable evidence was introduced to show that personal property generally was valued at actual value. Other testimony, oral and documentary, all by

experts, was devoted to establishing the value of LT&T property as a unit and allocating a proportion of that value to the personal property having its situs in York County. LT&T's evidence tended to show that the actual value of its personal property was less than that shown on Form 10. The board's evidence tended to show that the actual value of the LT&T property was considerably greater than that shown on Form 10, and that the use of the formulas provided by Form 10 did not result in a determination of actual value. The board's expert testified the actual value of the personal property was as follows: January 1, 1976, $4,765,800; January 1, 1977, $6,042,490. LT&T's expert fixed the values of the same property as follows: January 1, 1976, $2,754,900; January 1, 1977, $3,320,250. These conflicting opinions contrast with the returned value of $3,313,045 for 1976 and $4,236,897 for 1977.

The District Court, based on that evidence, wrote memorandum opinions in which it found, among other things, that real estate in York County was systematically assessed at less than actual value; that personal property generally was valued at actual value; that it was not possible, however, to determine from the evidence the degree of difference; and that the values of the personal property of LT&T reported on Form 10 for the years 1976 and 1977 were not the actual values of the property for the years in question. It also found that there was no evidence to support the 1976 increase in valuation.

The keystone of LT&T's position is stated in its brief as follows: "It should be presumed that the use of the Form 10 for the return of telephone company tangible personal property results in the return of such property at its fair and reasonable value for tax purposes. The County had the burden of overcoming this presumption and of establishing by clear and unequivocal proof that the use of the Form 10 resulted in an unfair and unreasonable determination of the actual value of

LT&T's tangible personal property situated in York County." LT&T points out that Neb. Rev. Stat. § 77-304 (Reissue 1976) requires the Tax Commissioner to approve all forms, schedules, books of instructions, etc., as may be necessary or expedient to the proper administration of the tax laws, and that Neb. Rev. Stat. § 77-305 (Reissue 1976) requires the Tax Commissioner to prescribe forms for the schedules for listing and assessment of personal property. It also notes that rule 16 of the Property Assessment and Appraisals Rules and Regulations, Nebraska Department of Revenue (1971), has approved Form 10.

It is now necessary to describe the information called for by Form 10. Line 1 requires the disclosure without itemization of the *book* value of tangible personal property (except materials and supplies) outside cities and villages. Line 2 requires the disclosure without itemization of the total *book* value of the same kind of property in cities and villages. Line 3 is simply the sum of lines 1 and 2. Line 4 is 60 percent of line 3. Line 5 requires the listing of the *actual* value of materials and supplies. Line 6 is described as the *total actual value* of all tangible personal property and is the sum of lines 4 and 5, i.e., book value less 40 percent depreciation. Line 7 is the assessed value, or 35 percent of line 6.

The testimony indicated that new items are added to the amounts on lines 1 and 2 at cost, including installation, etc. No further depreciation is ever taken except the 40 percent resulting from the use of the 60 percent component on line 4.

To support its contention that the use of Form 10 should be presumed to result in a determination of actual value and that the burden of proof is upon the taxing authorities to show otherwise, LT&T relies upon the general rule that actions taken by a governmental agency are presumed valid and the burden is upon the litigant to show otherwise. *Hammer v. Department of Roads*, 175 Neb. 178, 120 N.W.2d

909 (1963). That case involved an eminent domain proceeding in which highway construction limited access to certain property owners. The landowners sought to enjoin the right of the exercise of the power of eminent domain. There was also a claim of estoppel. There was no question in that case but that the power of eminent domain was properly exercised, and the principles of law relating to presumptions of the legality of the action of a government agency were not necessary to the determination of the case and certainly have no application in this particular case.

LT&T also relies upon the holding of this court in *Rodeo Tel. Membership Corp. v. County of Greeley*, 181 Neb. 492, 149 N.W.2d 357 (1967). That case involved the valuation of the tangible personal property of a telephone company. The telephone company reported an actual value of $43,270. The assessor raised the valuation to $86,088. The taxpayer's protest was rejected by the board of equalization and the taxpayer appealed. We affirmed the action of the board.

LT&T here asserts that the court in *Rodeo* placed its approval on the use of Form 10 as a means of determining actual value. The recital of facts in that case leads to an inference that the taxpayer did not report on Form 10. It also may be inferred that the assessor, in increasing the valuation, used a method, although not described literally as Form 10, that appears to have been that form or one at least calling for identical information prescribed by the Form 10 here involved. The opinion in that case recites that the information is based upon valuations reported by the taxpayer to the Nebraska State Railway Commission for determining the value of the tangible personal property included in the rate base for rate-making purposes.

The *Rodeo* case did not involve a question of "uniformity" or "proportionality" of taxation. The only question involved was whether the property was valued *in excess* of its actual value. The court in that

case noted at 495, 149 N.W.2d at 359: "[T]he 40 percent allowance for depreciation here seems reasonable, *if not excessive*, in arriving at an actual value for taxation." (Emphasis supplied).

The two cases in question and the statute do not support LT&T's claim of a presumption that Form 10 establishes actual value. The Nebraska Constitution, art. VIII, § 1, establishes the rule of taxation "by valuation uniformly and proportionately." Forms and schedules approved by the state for the purpose of establishing value must all be directed to effectuating the constitutional principle of proportionality or the statutory command that property be taxed at actual value. The adoption or approval of a form cannot prevail over the Constitution.

As far as burden of proof is concerned, *Rodeo* itself recites the rule that the taxpayer must establish that the value is excessive.

We have frequently recognized that approximation of value and uniformity is all that can be accomplished and that substantial compliance with the requirement of equalization and uniformity of taxation laid down by the federal and state Constitutions is all that is required, and such provisions are satisfied when designed and manifest departure from the rules is avoided. *Collier v. County of Logan*, 169 Neb. 1, 97 N.W.2d 879 (1959).

In order for a taxpayer to secure a reduction in the assessed value of his property, it must be demonstrated that the assessed value is grossly excessive, or that its value has not been fairly and proportionately equalized. *Collier v. County of Logan, supra.*

Even though it be conceded that LT&T's evidence has established that real estate is taxed in York County for the years in question at approximately 20 percent of actual value, rather than the 35 percent required by statute, it still remains necessary, in order for LT&T to show disproportionate taxation, to prove that its tangible personal property is assessed at sub-

stantially in excess of 20 percent of actual value. This it has not done. First, we decline to say that book value, less depreciation of 40 percent, establishes a presumption of actual value. Additionally, there is substantial evidence that the amounts reported on Form 10 were substantially less than actual value. Evidence in the record indicates that while Form 10 may have at one time resulted in a value approximating actual value, that was no longer true. A number of different types of analyses and appraisals had been done by the Department of Revenue which indicated that the information called for by Form 10 did not, under current inflationary conditions, accomplish that purpose. The board's expert testified that the use of Form 10 resulted in equalization with real estate because "there is as big a lag here as there is in real estate."

One more item pertinent to the proportionality discussion may be added. Because there were no sales of telephone companies such as LT&T, all expert witnesses who testified valued the property of the company by means of the capitalization of income approach and then allocated a portion of that value to York County equal to the percentage that the personal property of LT&T located in York County bore to the total personal property of LT&T not otherwise taxed. On surrebuttal, the board called as a witness a professor of finance who was also a certified public accountant. He testified that the method used by LT&T's principal valuation witness resulted not in a valuation of "the net utility plant," but in "a valuation of the debt and equity securities of the Lincoln Telephone and Telegraph Company."

We find on de novo review that LT&T has failed to establish by the evidence that its tangible personal property in York County was assessed at more than 20 percent of its actual value and, therefore, it is not entitled to the relief which it requests. The fact that the evidence tended to show that other types of personal

property were valued at close to 35 percent of actual value does not give LT&T any cause for complaint, because it obviously was not harmed because another taxpayer's property was valued at a greater proportion of actual value than its own.

LT&T argues some additional assignments of error which it claims require either reversal or that this court disregard certain portions of the board's evidence. LT&T objected to the surrebuttal testimony of the witness earlier referred to because the expert did not hold a real estate appraiser's license. It relies upon the provisions of Neb. Rev. Stat. § 81-8,286(1) (Cum. Supp. 1980), which provides: "No person shall, after January 1, 1974, act as a real estate appraiser without a license issued by the commission. This section shall not apply to any person exempted by any other provision of sections 81-8,276 to 81-8,287. No person shall testify as an appraiser before any tribunal, court, judge, referee, or judicial committee without being licensed under the provisions of sections 81-8,276 to 81-8,287." The argument is that, because the assets of the whole company must be valued and then the value allocated, the witness necessarily had to value real estate and hence was disqualified as a witness under the above statute. The objection is not well taken for two reasons. It does not appear from the record that the witness was making an appraisal of real estate. He was making a critique of a method of appraisal of a public utility property and in particular the use of the capitalization method to value intangible personal property of a utility in the manner that it was done by the expert witness whose appraisal was being criticized.

The record establishes that the valuation of public utilities, including telephone companies, calls for specialized knowledge that a person holding a real estate appraiser's license would not necessarily have. Neither LT&T nor the board's principal witness on valuation appears to have been licensed under

§ 81-8,286 or under the reciprocity provisions of Neb. Rev. Stat. § 81-8,279 (Cum. Supp. 1980), although both appear to have qualifications as real estate appraisers as well as appraisers of utility properties. The board objected to testimony of LT&T's valuation witness, a large portion of whose testimony related to establishing the sales assessment ratio valuations of real estate in York County. The objection was founded on the provisions of § 81-8,286(1). The trial court overruled the objection. Both the witness for LT&T and the witness for the board, on the issue of valuation of utility property, used information furnished by others, specifically LT&T's report to stockholders which showed the valuations of the various classes of property belonging to the company. This they were entitled to do under the provisions of Neb. Rev. Stat. § 27-703 (Reissue 1979), which says: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

LT&T assigns as error the refusal of the trial court to require the production of what is referred to as the "Cleminshaw appraisal." This was a countywide appraisal being performed pursuant to a contract with the county board. The appraisal began in November 1974 and was substantially complete by January 1, 1977, although the record does not show that it had yet been delivered to the board. The apparent purpose of requiring the production was to fortify LT&T's claim that real estate in the county was undervalued in the years in question. We point out, however, that LT&T prevailed on this contention and the trial court so found, and we have no reason to find otherwise. Production of the appraisal would not have aided LT&T for reasons already discussed, namely, in order to establish disproportionate

taxation the taxpayer is required to prove both parts of the equation, i.e., the percentage of actual value at which its own property was assessed and that the other property in the same class (real and personal property [with specific exceptions, such as automobiles, not pertinent] being in the same class) is undervalued. LT&T has failed to establish the first part of that equation.

LT&T urges that the trial court erred because it founded its decision upon a purported distinction between actual value and market value of real estate and that it was not possible for the court to determine the percentage of difference between the actual value of real estate and the actual value of personal property and, therefore, could give LT&T no relief.

LT&T points out that in interpreting Neb. Rev. Stat. § 77-201 (Cum. Supp. 1980) and § 77-112 (Reissue 1976), we have repeatedly said that for purposes of taxation, actual value, market value, and fair market value are synonymous terms. *Richards v. Board of Equalization*, 178 Neb. 537, 134 N.W.2d 56 (1965).

Our reading of the memorandum opinion leaves us puzzled as to the distinction the trial court was making. We, however, adhere to the historic definition. We recognize, of course, that in cases such as this where there is no market or no sale of like property, actual or market value must be arrived at by theoretical methods commonly used by appraisers qualified in the particular field. Whatever the trial court meant by its discussion, it nonetheless arrived at the correct result. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. *Strauss v. Square D Co.*, 201 Neb. 571, 270 N.W.2d 917 (1978).

The board has cross-appealed and urges that the increase in the 1976 valuation made by the board be restored. The trial court found that the increase was supported by no evidence. The record indicates that the increase was based upon sale by LT&T of

the stock of a cable television system owned by it, the total sale price of which was greater than the actual value of the assets returned for taxation. Such a sale is not the sale of the tangible personal property of the corporation. Even if we assume comparability of the nature of the underlying assets (and there is no evidence to show that), that evidence did not support the increase.

The judgment of the lower court is, in all respects, affirmed.

AFFIRMED.

DENNIS TROUT, APPELLEE, V.
OLSON BROTHERS MANUFACTURING COMPANY,
A NEBRASKA CORPORATION, APPELLANT.

308 N.W.2d 522

Filed July 17, 1981. No. 43468.

1. **Evidence: Appeal and Error.** In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact.
2. **Jury Verdicts: Appeal and Error.** A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Lathrop, Albracht & Swenson for appellant.

Abrahams, Kaslow & Cassman for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is an action on a written agreement to pay plaintiff termination pay of $25,000 in the event his

employment was terminated by the defendant corporation without plaintiff's consent. A jury returned a verdict for the plaintiff and judgment was entered on the verdict by the District Court. The defendant has appealed.

At the times material here, the defendant, Olson Brothers Manufacturing Company, was a Nebraska corporation engaged in the general business of manufacturing pivot irrigation systems. Its principal office was in Atkinson, Nebraska, approximately 200 miles northwest of Omaha. Theodore Olson and his wife owned 50 percent of the stock, and his brother, Carroll Olson, and his wife owned the other 50 percent. From the inception of the corporation Theodore (Ted) was president and Carroll was vice president and treasurer.

In late April or early May 1979 the plaintiff, Dennis Trout, was hired by the corporation as vice president and chief operating officer. His salary was $50,000 a year, with a severance payment of 3 months' salary if his employment was terminated by the corporation without his consent. On May 24, 1979, plaintiff was elected to the board of directors of the corporation. Plaintiff's evidence was that the corporation was in serious financial difficulty at the time plaintiff was hired and that his main responsibilities were to control and secure and improve the corporation's financial position. Ted denied that the corporation was in serious financial difficulty but admitted that the corporation was having cash flow problems.

The largest creditor of the corporation was Banco Financial Corporation which had a loan agreement with the corporation, based on current accounts receivable up to a maximum of $4 million. The corporation's largest account receivable debtor was Southwest Farms, a Texas corporation which was wholly owned by Ted Olson. As of August 29, 1979, Southwest Farms owed the defendant corporation $662,000 and Ted was disputing the amount.

The evidence is uncontradicted that on August 29, 1979, the financial condition of the defendant was such that if Southwest Farms did not pay the $662,000 owing to the corporation by August 31 the loan agreement with Banco would be in default and the corporation would not have funds to meet its payroll.

Banco called plaintiff three times on August 29 in regard to the financial situation, and in the final conversation instructed plaintiff to prepare a plan for financial recovery and to come to the offices of Banco in Minneapolis, Minnesota, for further discussions the next day. On August 30, 1979, the plaintiff Trout, Lee Duhacek, comptroller of the corporation, one of the corporation's attorneys, and several other members of the corporate staff went to Minneapolis and met with Banco officials. At that meeting the parties entered into an informal financial agreement. As a part of that agreement Banco required that (1) beginning August 31 no further shipments were to be made to Southwest Farms; (2) Ted and Carroll Olson were to meet with Banco in Lincoln within 10 days; (3) a mortgage on real estate owned by the corporation was to be executed on August 31 to Banco; and (4) $500,000 was to be paid to Banco on August 31. In exchange, Banco would postpone the payment of interest then due, waive the overage on the loan, and loan additional funds to meet the August 31 payroll and certain outstanding freight bills against an already pledged IRS refund.

The corporation representatives returned from Minneapolis on the evening of August 30 and brought with them a letter from Banco addressed to Ted and Carroll Olson which stated that unless the Southwest Farms account was paid by August 31, Banco would terminate financing. Ted Olson had been in Texas on August 30 and returned to Atkinson, Nebraska, about midnight. Later that night he received a telegram from Banco containing the same information as the letter.

When plaintiff arrived at work on the morning of August 31, he was advised that the $500,000 transfer of funds to Banco would not be made on that day in accordance with orders from Ted. Later that morning, Ted, Carroll, Duhacek, and the plaintiff met at the offices of the corporation and discussed the financial situation. Ted was outraged and furious. He said he did not need Banco and was not going to meet with any bankers or deposit money from Southwest Farms into the corporation account or execute any second mortgage. He suggested that he would meet the payroll by depositing $500,000 into his personal account.

When Ted left, Carroll Olson, Duhacek, and the plaintiff decided that Ted would have to be removed as president and that they would call a special meeting of the board of directors to meet at the offices of the corporation's attorneys in Omaha, Nebraska, at 5 p.m. that afternoon.

There were five members of the board of directors, Ted Olson, Carroll Olson, Lee Duhacek, Dale Wilson, and Dennis Trout, the plaintiff. All of them were also employees of the corporation and all were at the corporation office in Atkinson, Nebraska, on August 31 except Dale Wilson. He was at the State Fair in Lincoln, Nebraska, in charge of the corporation's promotional booth. Verbal notice was given to each of the five directors. The evidence is somewhat in conflict as to the exact time at which Ted was notified, but it was sometime between 11:30 a.m. and 1:30 p.m.

At approximately noon Carroll Olson, Duhacek, and the plaintiff picked up the corporate records and took them to an accountant's office in Atkinson. They met there to avoid Ted because they were afraid of his violent reaction. At approximately 1 p.m., Ted came into the accountant's office. He was extremely angry. There was testimony that a physical scuffle between Ted and Carroll occurred at the time and Ted told Duhacek and the plaintiff that they were fired.

Carroll Olson, Duhacek, and the plaintiff flew to Omaha in a chartered plane. The directors' meeting was called to order at approximately 5:30 p.m. in the offices of the corporation's attorneys in Omaha, Nebraska. Four of the five directors were present. Ted Olson was not present. Carroll Olson was elected temporary chairman and Duhacek was elected temporary secretary. The board amended Article III, section 4, of the bylaws of the corporation by deleting provisions that the president could not be removed from office except by vote of all the directors of the corporation other than the president and substituting a provision that any or all elected officers of the corporation may be removed from office without notice and without assigning any cause by the vote of a majority of the directors present at any regular or special meeting at which a quorum is present. The board then adopted a resolution removing Ted Olson as president and chief executive officer of the corporation and elected Carroll Olson as president and chief executive officer of the corporation, effective immediately. The directors then adopted a resolution authorizing the officers of the corporation or any one of them to execute and deliver to Banco Financial Corporation a second real estate mortgage on certain described real estate owned by the corporation and also authorized and directed the officers of the corporation to list certain property for sale.

The actions of the board were all taken by affirmative vote of three to one with Wilson voting "no." Upon completion of these actions the meeting of the board of directors was adjourned.

After the directors' meeting was adjourned, Carroll Olson, as president of the corporation, made an agreement with the plaintiff to continue as vice president and chief operating officer of the corporation at an annual salary of $50,000 per year, and that in the event of the termination of his employment by the corporation without his consent, plaintiff would be paid termi-

nation pay of $25,000 within 7 days after the termination. The agreement was confirmed in writing signed by Carroll Olson as president and chief executive officer of Olson Brothers Manufacturing Company.

On September 2, 1979, an agent on behalf of Ted Olson offered plaintiff $25,000 to resign immediately. The offer was refused. On September 6 Carroll Olson entered into an agreement to sell all his stock in the corporation to Ted Olson. Under the agreement Carroll was to resign as president and vote to reelect Ted as president and plaintiff's position as both a director and an officer was to be terminated. A special meeting of stockholders and directors was held on September 7, 1979, at which that agreement was consummated and plaintiff was fired. When plaintiff was notified of his termination as an officer and director of the corporation he made oral and written demand for the $25,000 severance pay, which was refused by the corporation. This action was filed on September 26, 1979.

The case was tried to a jury in April 1980 and the jury returned a verdict for the plaintiff in the sum of $25,000. This appeal followed.

The defendant contends that as a matter of law there was insufficient notice to Ted Olson of the special directors' meeting and insufficient proof of any financial emergency and that the actions taken at the special directors' meeting in Omaha, Nebraska, on August 31, 1979, were invalid and of no force and effect and that the act of Carroll Olson in making the employment contract with the plaintiff was, therefore, an ultra vires act and not binding on the corporation.

The bylaws of the corporation which are involved here were the initial bylaws of the corporation, ratified and adopted by the stockholders, board of directors, and officers of the corporation on January 2, 1968. A portion of Article II, section 3, of the bylaws provided: "Regular meetings of the Board of Directors may be held without call or formal notice, at such

places, within or without the State of Nebraska, and at such times as the Board may determine by formal resolution. Special meetings may be held at any place, either within or without the State of Nebraska, as may be called by the president or any two members of the Board of Directors. Except as otherwise provided herein, notice of meetings of the Board of Directors shall be given either personally or by mail, and if by mail, such notice shall be sufficiently given if deposited in the United States mail not less than five (5) days prior to such meeting, addressed to the director, with postage thereon prepaid. Waiver by a director in writing of notice of any directors' meeting, whether before or after the time of such meeting, shall be equivalent to giving such notice. Attendance of a director at such meeting shall constitute a waiver of notice of such meeting."

Article II, section 4, provides in part: "A majority of the Board of Directors shall be necessary and sufficient to constitute a quorum for the transaction of business at all meetings thereof, and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors."

Article IX provides: "The Board of Directors shall have the power, by the affirmative vote of a majority thereof, to make, alter, or repeal the By-laws of the corporation; provided, however, that a majority of the stockholders at any regular or special meeting may make, alter or repeal the By-laws, and the Board of Directors shall not thereafter alter or repeal any portion of the By-laws which have been so made, altered, or repealed by the stockholders."

In the case at bar the evidence is undisputed that each director, including Ted Olson, had actual personal notice of the special meeting of the board of directors, and four of the five directors attended the special meeting. The defendant corporation now contends that the notice did not give Ted Olson a reasonable amount

of time in which to travel to the meeting.

The problem with that contention is that the jury was specifically instructed that the notice that must be given to the members of the board of directors for a special meeting must be given a reasonable length of time before the time fixed for the meeting of the board of directors, affording each of them a reasonably ample time to attend. The issue of what was a reasonable time under the circumstances present here was specifically submitted to the jury and the jury determined that issue.

The defendant corporation also contends that there was no financial emergency sufficient to justify a special directors' meeting on such short notice. The defendant concedes that the giving of notice of a special directors' meeting may be excused because of an emergency which demands immediate attention, at least so far as an absent or inaccessible director is concerned. See Fletcher, Cyclopedia of the Law of Private Corporations § 408 (rev. perm. ed. 1969). In this case the jury was instructed that a real emergency to the corporation which demanded immediate attention could excuse the requirement of notice but a fancied emergency could not. The jury was also instructed that a financial crisis of a serious nature to the corporation, if it found such a condition existed, can be a real emergency. Just as with the issue of reasonable time of notice, the issue of whether or not an emergency existed was specifically submitted to the jury and the jury determined that issue.

Finally, the defendant corporation argues that because the initial bylaws were ratified and adopted by the board of directors and by the stockholders, none of the bylaws could thereafter be altered, amended, or repealed by the board of directors, even though Article IX specifically gives the board of directors the power to do so. The defendant cites no authority for the proposition nor have we found any.

The bylaws themselves provide: "The Board of Di-

rectors shall have the power, by the affirmative vote of a majority thereof, to make, alter, or repeal the By-laws of the corporation . . . ." That power is limited only by the proviso that if the stockholders at a regular or special meeting make, alter, or repeal any portion of the bylaws, the board of directors shall not thereafter alter or repeal that portion. If those provisions be interpreted to mean that the ratification of the initial bylaws of the corporation by the stockholders is an exercise of the proviso, then the board of directors has no power whatever to make, alter, or repeal the bylaws. Under the circumstances here, the proviso did not come into operation and the board of directors had the power to make, alter, or repeal the bylaws of the corporation.

The case before us is a law action tried to a jury. The verdict of the jury turned upon a determination of the factual issues based on conflicting evidence. The instructions covered the issues and fairly submitted the case to the jury. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. *Merten v. Pedersen*, 199 Neb. 34, 255 N.W.2d 869 (1977).

The verdict of the jury was not clearly wrong and the judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BOBBY J. JACKSON, APPELLANT.

308 N.W. 2d 527

Filed July 17, 1981. No. 43749.

1. **Criminal Trials: Identification Procedures.** An in-court identification based on the witness' observations at the time of the alleged crime is admissible.
2. ____:____. The criteria for determining whether identification testimony will be admissible after a suggestive lineup are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
3. **Sentences: Appeal and Error.** A sentence imposed which is within the statutory limits will not be disturbed on appeal absent an abuse of discretion.
4. **Sentences.** Upon conviction for the use of a firearm to commit a felony, the statute requires that any sentence is to be served consecutive to any other sentence imposed.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

H. Jerome Kinney for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

WHITE, J.

The defendant, Bobby J. Jackson, was convicted in the District Court for Douglas County, Nebraska, on an information charging him with the offense of robbery and use of a firearm to commit a felony. The defendant was sentenced to a term of 10 to 15 years in the Nebraska Penal and Correctional Complex for the offense of robbery and to a term of 3 to 5 years in the complex for the use of a firearm, the

sentences to be served consecutively and consecutive to a sentence defendant was then serving for burglary. The defendant appeals to this court and assigns as error: (1) The District Court erred in overruling a motion to suppress the identification of the defendant which the defendant alleges was unduly suggestive and prejudicial; (2) The District Court erred in failing to dismiss both counts of the information for the reason that the evidence was, as a matter of law, insufficient to prove the essential elements of the crimes of robbery and use of a firearm in the commission of a felony; and (3) The sentences were excessive. We affirm.

On March 30, 1980, Bruce Kirk, an employee of the Crest Service Station located at 5717 No. 60th Street, Omaha, Nebraska, was on duty at approximately 8:25 a.m. at Crest. The office of the service station was locked and Kirk was requested by the defendant to be allowed to come into the office to use a pay telephone. Kirk complied. The defendant came into the station, used the telephone, produced a gun, and demanded that Kirk give him money. Kirk was not convinced that the gun was real and informed the robber that he thought he was kidding. When the defendant pointed the firearm at the window of the station and discharged it, causing a bullet to pass through the glass of the service station window, Kirk then produced the bills and the defendant fled. Kirk called the police and described the robber as a black male, approximately 6 feet 2 inches in height, 180 pounds, wearing a long tan coat, a tan stocking cap, and a dark pair of pants. Kirk identified the defendant at trial as the man who had robbed him that morning.

Officer Martha Husebo was on duty in her cruiser that morning in the area of 56th and Ames Streets in Omaha when she received the radio call of the robbery of the Crest Service Station at 5717 No. 60th Street. The robber was described as a black male 6 feet 2 inches, around 190 pounds, wearing a brown

stocking cap, a torn brown overcoat, and dark pants, headed south on 60th Street. Officer Husebo proceeded in her cruiser west on Ames Street to 60th Street and then north on 60th Street. As she neared 5705 No. 60th Street, she observed a black male of the description just received by her over the radio. She pulled into the driveway after giving her radio location to other cruisers, told the man to stop, and the man ran. She pursued and lost him in the area. She identified the man she saw at the driveway as the defendant. When additional police arrived, Officer Husebo returned to the Crest station. Other officers began searching the areas in and around the crime scene, including a vacant lot near 58th and Fort Streets on which a number of large culverts were stored. As Officer Ben McAdams looked into one of the culverts, he saw a black male matching the description of the man who had run from Officer Husebo. McAdams ordered the man from the culvert and placed him under arrest. A search disclosed that at the place where the defendant was lying inside the culvert, the sum of $84 in bills was found. Kirk had testified that $83 or $84 was the amount taken from him in the robbery as determined by the owner of the station. The defendant was then immediately taken to the service station where the attendant Kirk was asked "if this was the man that robbed me," and Kirk answered "yes." The defendant was then taken to the Omaha police station.

At approximately 9:40 a.m. of that same day, after appropriate *Miranda* warnings were given, the defendant gave an exculpatory statement to Officer Frank O'Connor of the Omaha Police Department. The next day the same officer again spoke to the defendant, read him his *Miranda* rights, which were waived by the defendant, and told him he wished to speak to him to clear up some matters. At that time the defendant told the officer that he had been forced to commit the robbery by three other black males who claimed that he owed them some money. He stated that

he had only one bullet in the gun; that he fired the gun through the window to convince the clerk that his robbery intention was serious; that after he came out of the Crest station the three black males who had forced him to commit the robbery were gone; and that he threw the gun away "somewhere, he wasn't sure where." He was eventually arrested.

The testimony of Officer John L. Powers, who is experienced in ballistics, testified that the hole in the window of the Crest station had been caused by someone firing a gun from the inside of the store. No gun was produced at trial.

Essentially, the defense offered by the defendant was that of alibi. The exculpatory and incriminating statements of the defendant were challenged at a pretrial suppression hearing. The trial court found that the defendant had been apprised of his constitutional rights, had waived those rights, and the statements were voluntarily and intelligently given to the police. It denied the suppression motion. The statements were admitted at trial and that ruling is not here attacked.

With respect to the first assignment of error, the trial court held: "I have considered it, went over my notes very carefully covering the circumstances surrounding the identification of the Defendant. The evidence convinces me that constitutional due process rights of the Defendant were in no way infringed and were not violated. I find that there was no substantial likelihood of misidentification, and overrule your motion to suppress the testimony of Bruce Kirk concerning the identification. I find that Bruce Kirk was in such close proximity to the Defendant that he could easily make the identification, he had an opportunity to observe the Defendant, his description as given by him coordinated in essential respects with the general characteristics of the Defendant; that the confrontation occurred very shortly after the alleged crime, that Bruce Kirk

was able to make a positive identification in this courtroom without qualification or limitation; that at the time the confrontation took place the evidence convinces me that Kirk did not know that the money had been recovered, that Kirk, when asked to make the identification, did so without any improper suggestion in terms of being able to view the Defendant for purposes of identification. Your motion is overruled."

We note, in passing, first that the trial was one to the court; that for the purpose of convenience, the trial court consolidated the hearing on the pretrial lineup and the trial in chief. The trial court found, and the record is clear that it had a sufficient basis for doing so, that the witness Kirk had a clear and independent recollection of the defendant quite apart from any pretrial showup. The in-court identification was based on the witness' observations of the defendant at the time of the robbery, not at the time of showup, and it is therefore admissible. *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

The criteria for determining whether identification testimony will be admissible after a suggestive lineup are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). The evidence clearly supports the finding of the trial judge that the in-court identification was admissible. The assignment of error is without merit.

The second assignment of error is equally without merit. In addition to the eyewitness identification of the defendant and his confession, the defendant was identified and ran from a police officer near the area where the robbery took place; he was found hiding in

the area; and the amount of money, almost identical with the amount claimed as stolen, was recovered. The allegation that there is insufficient evidence to convict on the crime of robbery is so nonmeritorious as to approach being frivolous.

The assignment of error with respect to the alleged insufficient evidence of the crime of use of a firearm in the commission of a felony is equally without merit. Defendant apparently argues that since the revolver was not recovered, a conviction cannot be had with respect to this offense. He argues that there was no proof, other than the testimony of the victim of the robbery, as to when the bullet hole was put in the window of the Crest Service Station. He suggests that while the testimony of the officer established that a bullet had indeed been fired from the inside to the outside of the window, the time when it was fired can only be established by Kirk, the victim, and that somehow this eyewitness testimony is not sufficient. We have recently considered the argument that we should not affirm a conviction where the sole and only evidence with respect to the crime comes from an eyewitness because of the supposed inherent unreliability of eyewitness testimony. We rejected that contention in *State v. Ammons*, 208 Neb. 812, 305 N.W.2d 812 (1981); *State v. Franklin*, *ante* p. 281, 307 N.W.2d 513 (1981). The eyewitness testimony in this case is shown to be greatly reliable. The assignment of error is also without merit.

The third assignment of error suggests that the sentences were excessive in that they are to be served consecutive to each other and consecutive to a sentence defendant was already serving for burglary. Robbery is a Class II felony and is punishable by imprisonment of from 1 year to 50 years. The use of a firearm to commit a felony is a Class III felony punishable by 1 year to 20 years of imprisonment, or a fine of up to $25,000, or both such fine and imprisonment. Each of the sentences was well within the statutory limits.

A sentence imposed which is within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Kramer*, 203 Neb. 658, 279 N.W.2d 634 (1979). Upon conviction for the use of a firearm to commit a felony, the statute requires that any sentence is to be served consecutive to any other sentence imposed.

The defendant, in addition to a number of convictions for traffic violations, has had two convictions for disorderly conduct and two prior convictions for burglary. The trial judge at sentencing found that the defendant would probably engage in additional criminal conduct if he were not in jail because the crimes he had just been convicted of were committed while he was out on bond on another burglary charge. He found that any lesser sentence would indicate to the public that such crimes were not treated seriously by the court. He expressed concern over the escalation of the crimes committed by the defendant and the continued insistence by defendant that he was not involved. We agree with the trial court. The assignment of error is without merit.

The judgment and sentence of the defendant are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK ALLEN LINGLE, APPELLANT.

308 N.W.2d 531

Filed July 17, 1981. No. 43940.

1. **Indictments and Informations: Appeal and Error.** An information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
2. ____: ____. A complaint charging a statutory misdemeanor substantially in the language of the statute will be liberally rather than technically construed, and if a defect is amendable, it will be held sufficient on appeal in the absence of objection in the trial court.

3. **Indictments and Informations.** An information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for this same offense.
4. **Criminal Law: Witnesses.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admissible if elicited from him or established by public record during cross-examination, but only if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, or involved dishonesty or false statement.
5. **Jury Instructions: Appeal and Error.** When complaint is made of the refusal of the District Court to give an instruction asked, the burden is upon the party complaining to show not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case.
6. **Arrests: Words and Phrases.** In making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances.
7. **Arrests.** The officer is not required to determine at his peril the precise amount of force necessary in each instance and to use that much and no more, and he may be guided by the reasonable appearances and the nature of the case in determining the amount of force to be used.
8. **Arrests: Juries.** The reasonableness of the force used in effecting an arrest is a question for the jury.
9. **Sentences: Probation and Parole.** When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life.
10. **Probation and Parole: Search and Seizure: Constitutional Law.** Conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional.
11. **Probation and Parole.** While a person is on probation his expectations of privacy are less than those of other citizens not so categorized.
12. **Probation and Parole: Waiver: Extradition.** Requiring the execution of a waiver of extradition as a condition precedent to probation does not render the waiver involuntary without a specific showing of how such a condition was coercive as applied in the particular case.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

H. E. Hurt, Jr., James A. Gallant, and Jeffrey S.

Flores for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

WHITE, J.

Appellant, Mark A. Lingle, appeals from an order of the District Court for Dodge County, Nebraska, affirming the judgment of conviction entered on the jury verdict in the county court of Dodge County, Nebraska. The jury found the appellant guilty of resisting arrest, disturbing the peace, and obstructing a police officer. The court sentenced defendant to 1 year's probation subject to numerous conditions, including one that he serve 6 months in the Dodge County jail. Appellant appealed to the District Court for Dodge County, which, on November 18, 1980, affirmed the judgment and conviction but remanded the case to the county court for resentencing after finding that the sentence of probation by the county court was not imposed in conformity with the provisions of Neb. Rev. Stat. § 29-2262 (Reissue 1979). On remand, the county court again sentenced defendant to 1 year's probation but reduced the time to be served in the Dodge County jail to 90 days; the rest of the original conditions of probation remain the same after sentencing on remand. Appellant has appealed to this court, assigning numerous errors.

Although the testimony in the record is conflicting, it appears that the facts of this case are as follows. On March 7, 1980, appellant, then age 19, and another man, Brad H. Charter, were tenants in one side of a duplex at 204 So. Clarmar Street, Fremont, Nebraska. Through the course of the evening of March 7, 1980, friends of appellant and his roommate began to gather at this duplex, and by late in the evening

there were, according to the testimony, somewhere between 10 and 30 people at the duplex drinking beer, engaging in conversation, and playing either a stereo or a radio. Police officers testified that they observed some of the guests at the duplex smoking marijuana; however, no arrests for possession of marijuana were made. During the course of this evening, appellant and some friends left the duplex and went to a local lounge where they remained until sometime between 11 p.m. and 1 or 1:30 a.m. While appellant and his friends were at the lounge, the "party" continued at the duplex. Sometime after 10 p.m., a neighbor, one Russell Benjamin, who lived in the other half of the duplex, entered appellant's side of the duplex in an apparent effort to register a complaint as to the noise level in appellant's side of the duplex. Fisticuffs between Benjamin and various guests ensued, and Benjamin left. Shortly thereafter, Benjamin returned with the landlord, Gary Pebley. More fisticuffs ensued between the guests, Benjamin, and the landlord, and police were summoned. Before the police arrived, appellant and his friends arrived at the duplex from the lounge.

It is appellant's testimony, and the testimony of some defense witnesses, that when he returned, he made his way to the basement of the duplex with several other people. At the time appellant returned from the lounge, neither the police nor the landlord had yet arrived. While appellant was still in the basement, Benjamin and the landlord returned and the second incident of fisticuffs ensued. Shortly thereafter, the police arrived. Police Officer Fish testified that after breaking up two fights he went into the kitchen area of the duplex. He was followed, according to his testimony, by a large and rather noisy group of people. He "announced in a large voice that the party was over, that it was creating a disturbance." At this time, the officer testified, Mark Lingle "apparently came through a doorway, yelling and screaming and

waving his hands and comes directly at me, takes both hands and pushes me back against several other parties." There is a great deal of conflict in the testimony of the witnesses as to how the initial contact between the appellant and Officer Fish came about. At any rate, after the initial contact, the officer testified that he believed the appellant was about to hit him, and, as a result, the officer jabbed the appellant in the stomach with his flashlight. As he was bringing the flashlight up to strike the appellant on the chin, the appellant doubled over and the flashlight instead struck the appellant in the forehead, causing a gash which required several stitches to close.

Officer Fish and another Fremont police officer, Reserve Officer Ellis, then placed handcuffs on the appellant, advising him that he was under arrest. There is testimony in the record, although it is contradicted by some defense witnesses, that appellant resisted the officers' attempt to handcuff him. After appellant was handcuffed, he was taken out to the police car and transported to Dodge County Hospital where the wound in his head was stitched. During the time that he was being taken to the police car and to the hospital, the officers testified that he was verbally abusive toward them. After appellant's head wound received medical attention at the Dodge County Hospital, he was taken to the Dodge County jail where he spent several hours in the sobriety cell. When he was released from the sobriety cell, Officer Fish testified that he explained to appellant the charges that had been filed against him and then returned appellant to his home. Appellant was originally charged with third degree assault, resisting arrest, disturbing the peace, and obstructing a peace officer. However, at the end of the State's case during trial, appellant's attorney moved that the assault charge be dismissed since the State had failed to prove that appellant caused bodily injury to Officer Fish. The motion was granted. Following the trial, the jury

found the appellant guilty on the remaining three counts of the complaint. He was sentenced as set out above and has perfected this appeal.

Appellant's first assignment of error is that the trial court erred in failing to dismiss count III of the complaint, disturbing the peace, since it does not allege specifically what defendant did that willfully disturbed the peace. However, defendant concedes that he did not file a demurrer to the pleadings. This court stated in *State v. Haile*, 185 Neb. 421, 423, 176 N.W.2d 232, 234 (1970), that "an information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted." The complaint in this case charged that Mark Lingle, on or about the 8th of March 1980, in Dodge County, "did then and there intentionally disturb the peace and quiet of a person, family or neighborhood, to-wit: by shouting at police, and starting to pick a fight with police, after they had ordered all persons to leave a noisy party that Mark Lingle was at . . . ." The statute, Neb. Rev. Stat. § 28-1322 (Reissue 1979), simply states that "[a]ny person who shall intentionally disturb the peace and quiet of any person, family, or neighborhood commits the offense of disturbing the peace." In *State v. Haile*, *supra* at 424, 176 N.W.2d at 234, we also stated: "A complaint charging a statutory misdemeanor substantially in the language of the statute, will be liberally rather than technically construed, and if a defect is amendable, it will be held sufficient on appeal in the absence of objection in the trial court."

State v. Dreifurst, 204 Neb. 378, 381, 282 N.W.2d 51, 53 (1979), stated: "[A]n information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense." We believe that

the information charging the appellant with disturbing the peace was sufficient under the standards set out in *State v. Haile, supra,* since we cannot say that it is so defective that by no construction can it be said to charge the offense of disturbing the peace. Furthermore, it is plain from the record that the defendant was able to prepare his defense to the charge of disturbing the peace, and we think it is clear that he would be able to plead the judgment rendered on that charge as a bar to later prosecution for the same offense. The assignment of error is without merit.

Appellant next assigns as error the court's failure to dismiss the counts of resisting arrest and obstructing a police officer on the grounds that there was no evidence of intent to commit either of these offenses. There is sufficient evidence in the record on the question of intent that the trial court's action in sending the issue to the jury was correct. Officers Fish, Ellis, and Seyboth all testified as to the manner in which appellant resisted the arrest, both physically and with verbal abuse directed toward the officers. Although their testimony was contradicted in some respects by testimony of defense witnesses, the resolution of the conflicting evidence was for the jury. Therefore, these assignments of error are likewise without merit.

Appellant next argues that it was error for the trial court to allow the State's attorney to introduce into evidence probation orders for two defense witnesses who, in their testimony, admitted that they had previously been convicted of a felony. Initially, we note that appellant's attorney made no objection when the order of probation of one Rick Goebel was introduced at trial and, thus, has waived that issue on appeal. *State v. Hogan,* 194 Neb. 207, 231 N.W.2d 135 (1975). Thus, the only issue in this assignment of error which we may properly review is whether or not the order of probation of the witness Brad Charter was properly introduced.

Neb. Rev. Stat. § 27-609(1) (Reissue 1979) states: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment." This statute, passed in 1975, repealed the former statute on this point which was found at Neb. Rev. Stat. § 25-1214 (Reissue 1964): "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof." Under the former statute, we stated in the case of *State v. Kallos*, 193 Neb. 113, 121, 225 N.W.2d 553, 557-58 (1975), that "where a witness on cross-examination admits previous conviction of a felony, it is error to allow further inquiry on the subject or permit the record of the conviction to be introduced." The wording of the new statute states only that evidence of a prior conviction may be admitted if elicited from the witness or established by public record, but it neither directly adopts nor rejects the holding of *State v. Kallos, supra.*

In the case of *State v. Reinert*, 197 Neb. 379, 248 N.W.2d 782 (1977), the prosecuting attorney, after eliciting from the witness an admission that he had been previously convicted of a felony, then questioned the witness about his present incarceration. Objection to the question was sustained. On appeal we said: "The question regarding his present incarceration for the admitted felony, although improper, was not prejudicial as it added no additional detrimental information." *Id.* at 380, 248 N.W.2d at 784. The same principle holds true in this case. If it was error for the trial court to admit the order of probation after the witness Charter's admission that he had been convicted of a felony, the order of probation itself did not add

any detrimental information bearing on the credibility of the witness that was not already present by his answer on cross-examination. Thus, we find that the admission of the order of probation, if error it was, constituted no more than harmless error and is not grounds for reversal. A number of other witnesses testified to the same or a similar version of the events as the witness Charter, and thus, any damage to Charter's credibility resulting from the admission of the probation order was not prejudicial to a substantial right of the appellant. The assignment of error is without merit.

Appellant next argues that it was error for the trial court to refuse to give the following instruction: "The use of force by an officer in making an arrest is not justifiable unless such officer makes known to the person to be arrested the purpose of the arrest. The use of deadly force by an officer in making an arrest is not justifiable unless the arrest is for a felony." We note first that appellant is under a threefold burden in making this complaint. As was said in *Phillips v. State*, 154 Neb. 790, 800, 49 N.W.2d 698, 705 (1951): "'"When complaint is made of the refusal of the district court to give an instruction asked, the burden is upon the party complaining to show, not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case."'" Appellant fails in meeting this burden with regard to the requested instruction because the instruction is not correct as a proposition of law.

According to *Breese v. Newman*, 179 Neb. 878, 880-81, 140 N.W.2d 805, 808 (1966), "[i]n making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation

of the arresting officer, would have deemed necessary under the circumstances." Further, "[t]he officer is not required to determine at his peril the precise amount of force necessary in each instance and to use that much and no more, and he may be guided by the reasonable appearances and the nature of the case in determining the amount of force to be used." 6A C.J.S. *Arrest* § 49 at 114 (1975). The reasonableness of the force used in effecting an arrest is a question for the jury. *Breese v. Newman, supra.* The trial court's refusal to give the instruction requested by appellant was correct and this assignment is without merit.

Appellant also argues that it was error for the court to include, as a condition of his probation, paragraph 15 of the order of probation which states: "That he shall be subject to the search of his personal and real property at any time, day or night, by any law enforcement or probation officer without the issuance of a search warrant." The statute under which the trial court was authorized to place the defendant on probation, Neb. Rev. Stat. § 29-2262 (Reissue 1979), states: "(1) When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life." This statute also states: "(2) The court, as a condition of its sentence, may require the offender: . . . (p) To satisfy any other conditions reasonably related to the rehabilitation of the offender."

This court recently, in the case of *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980), considered a condition in the appellant's probation which required him to submit to a search of his person or property at any time, by any law enforcement officer, with or without probable cause, for controlled substances. The appellant in *Morgan* had been convicted of possession of controlled substances. In *Morgan* at 826-27, 295 N.W.2d at 289, this court stated that

"conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional." This court in the *Morgan* case relied to some extent on the case of *State v. Montgomery*, 115 Ariz. 583, 566 P.2d 1329 (1977), which stated that a condition similar to the one at issue here "is a restriction upon the defendant's privacy, but this does not make the condition unconstitutional. While defendant is on probation his expectations of privacy are less than those of other citizens not so categorized. It is not an unreasonable or an unconstitutional limitation upon his right to be free from unreasonable searches and seizures." *Montgomery* at 584, 566 P.2d at 1330.

The Dodge County Court, in ordering probation for the appellant, added certain other conditions, including ones that he refrain from the use of alcoholic beverages and that he refrain from the use or possession of narcotics. The warrantless search condition is reasonably related to enforcement of the other conditions of appellant's probation, and we feel that all these conditions are reasonably related to the rehabilitation of appellant. It is apparent from the record that the use of alcoholic beverages contributed to a large extent to the disturbance which led to appellant's arrest, and the presentence investigation conducted into appellant's background disclosed that he used alcohol and controlled substances on a rather regular basis. It was well within the trial court's discretion to consider the information in the presentence investigation when sentencing the appellant. *State v. Kramer*, 203 Neb. 658, 279 N.W.2d 634 (1979). This assignment of error is without merit.

Appellant next argues that the trial court erred in requiring defendant, as a condition of probation, to sign a waiver of extradition in the event he is charged with violation of probation. We note first

that it does not appear that the waiver of extradition is, in fact, a condition of probation. However, were we to consider it as such, the weight of authority holds that such waivers are valid. In *Pierson v. Grant*, 527 F.2d 161 (8th Cir. 1975), where the appellant signed a waiver of extradition as a condition precedent to parole, the court stated at 164: "Requiring the execution of a waiver of extradition as a condition precedent to parole does not render the waiver involuntary without a specific showing of how such a condition was coercive as applied in the particular case." In 35 C.J.S. *Extradition* § 2 at 382 (1960), it is stated: "Since the purpose of extradition is the return of a fugitive, none of his constitutional rights, other than his right to personal liberty, are involved." In *Forester v. California Adult Authority*, 510 F.2d 58, 61 (8th Cir. 1975), the court stated that "Forester claims that conditioning his parole upon the execution of an extradition waiver was per se coercion. This is not the law. Parole is an act of grace and reasonable conditions may be imposed in connection therewith. . . . Nor has Forester demonstrated how such a condition was coercive as applied to him." Appellant has made no showing that the waiver of extradition which he signed was involuntary or coercive as applied to him. Therefore, this assignment of error is likewise without merit.

The final assignment of error by appellant which we will consider here assigns as error numerous evidentiary rulings of the trial court whereby objections of appellant's attorney to questions by the State's attorney were overruled. In his brief to this court, appellant's attorney concedes "that no one [of these rulings] would be enough to unduly prejudice the rights of the defendant. It doesn't take but a few, however, to give the impression to the jury that the court has formed an opinion favorable to the State's case." We have reviewed these rulings and find that the facts which the challenged testimony was intended

to elicit were amply established by other testimony to which there was no objection. Additionally, in its instructions to the jury, the trial court included the standard cautionary instruction that the jury "must not construe any statements, actions, or rulings of the court in the trial of this case . . . as reflecting an opinion of the court as to how this case should be decided." This cautionary instruction has long been held sufficient under our adversary system of justice to cure the problem which appellant raises. This assignment of error, like the others, is without merit.

We have reviewed appellant's remaining assignments of error referring to improper charging of the defendant, selective law enforcement, etc. We find that these assignments of error are nonmeritorious, to the point of being frivolous. The verdict of the jury and the judgment and sentence of the trial court were correct in all respects and are affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

I generally concur in the majority opinion in this case. I must, however, dissent from that portion of the majority opinion which holds that conditions in a probation order requiring the probationer to submit to warrantless searches and requiring the execution of a waiver of extradition as a condition precedent to probation do not deny to the probationer those constitutional rights which he retains notwithstanding his conviction of a crime.

I have already set out my reasons for so holding in my dissent in *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980), and will not repeat them here.

Carrying the arguments of both *State v. Morgan* and the instant case to a possible conclusion, one could argue that an individual placed on probation could be required as a condition of probation to give up all of one's constitutional rights. I do not believe

that such a requirement is lawful. I would hold that such requirements as those contained in the instant order of probation were invalid and should not be enforceable under the conditions presented in the instant case.

STATE OF NEBRASKA, APPELLEE, V. HERSCHEL J. SMITH, APPELLANT.

308 N.W.2d 820

Filed July 24, 1981. No. 43180.

1. **Confessions.** The standards to determine the admissibility of statements made after an illegal arrest are: (1) The administration of the *Miranda* warnings prior to the statement; (2) The temporal proximity of the arrest and the confession; (3) The intervening circumstances between the initial detention and the challenged statements; (4) The purpose and flagrancy of the official misconduct; and (5) The voluntariness of the statement must be established.
2. ____. Where there is one confession by a defendant properly admitted into evidence and there was strong corroborative evidence of the guilt of the defendant, the admission of another confession, even though it should have been excluded, is harmless error.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

HASTINGS, J.

The defendant, Herschel J. Smith, was convicted by a jury of robbery of a liquor store and was sentenced by

the District Court for Douglas County to serve 5 to 7 years in the Nebraska Penal and Correctional Complex. The only assignment of error is that the District Court erred in failing to suppress the confessions given by the defendant, based on an unlawful arrest. We affirm.

On August 24, 1979, a black male entered Bricks Liquor Store at about 11:10 p.m., and asked the owner, Edward Adam, for some beer. As Mr. Adam bent down to reach for the beer, he observed two more black males enter the store, and one pulled out a gun, went toward Mrs. Adam, who was in the back of the store, and told her to hang up the telephone receiver. The third man had what the Adams described as a sawed-off shotgun, and what the defendant has described as a stick made to look like a shotgun. Mr. Adam was told to open the cash register, which he did, and the money was placed in a paper sack. One of the men grabbed some cigarettes, and the three ran out the back door of the store.

A man who was in his pickup saw the three men running down the alley and began to chase them. After driving down the alley the man apparently lost track of them, although while circling around the block he noticed one black male in a car which hurriedly pulled out of a nearby parking lot. The witness gave the description of the vehicle and the license number to police officers. The automobile was traced and found to belong to Billy Berrian.

Berrian was arrested on Sunday, August 26, 1979, for suspicion of robbery, and identified another person who was involved in the robbery, known to him as "Hershey." Berrian told officers that he did not know Hershey's last name, but did know where he lived, although he could not give the exact address. On Monday, August 27, police officers drove Berrian to a house which he pointed out as Hershey's residence. The police took Berrian back to the detention center and returned to the neighborhood, where they questioned neighbors and learned that a family named Smith lived

at that address. On Tuesday, August 28, at approximately 8:10 a.m., three officers went to the Smith residence to arrest Herschel Smith. The officers did not secure an arrest warrant, although they believed that at that time they had enough information to arrest Herschel.

Two officers went to the front door and one went to the back. The officers knocked on the front door, and it was opened by Samuel Smith, Herschel's younger brother. The officers entered the house and began searching the residence for Herschel Smith. Samuel Smith testified that he assumed the men entering the house were police officers, although they were dressed in plain suits and did not identify themselves. He repeatedly asked them if they had a warrant to search his mother's house, although he did not know what the purpose of their visit was. The officers did not answer Samuel's questions and they told him to sit down and shut up. Within a few minutes, Herschel emerged from the bedroom where he had been sleeping and told officers to stop harassing his little brother. The officers then arrested Herschel and allowed him to get dressed before transporting him to police headquarters. The defendant was informed of his *Miranda* rights and he agreed to talk about the robbery. At approximately 9:10 a.m., Herschel gave a taped statement describing his involvement in the incident.

The next day, Wednesday, August 29, at approximately 9:27 a.m., police officers again informed the defendant of his rights and again took a taped statement. About an hour later the police interviewed Berrian regarding the robbery. After the questioning of the two men, police officers determined that there were inconsistencies between the stories regarding the extent of their involvement and the roles they played in the incident. In order to clear up the inconsistencies, the police decided to bring the two men together. It is in dispute as to what occurred at that point in time. According to the officers present, the two men had

about a 5-minute discussion about their respective roles in the incident. According to both defendants, who testified at the suppression hearing, they did not have a discussion of any sort. Berrian stated: "I did not speak to him. Herschel Smith walked in the office and one officer said that Berrian said this and Herschel Smith said he is telling a damn lie, or something like that, and walked away." Smith agreed that the incident occurred the way Berrian described it.

After the two men were separated, Smith again gave a taped statement regarding his involvement in the robbery. According to Officer Frank T. O'Connor, Smith gave the third statement in order to clear up the inconsistencies. "Mr. Smith stated that he wanted to set the record straight and he wanted to tell how it went down and what his participation was in it and what had taken place." The last statement was given after the defendant had been again informed of his *Miranda* rights and agreed to waive them. The second tape was destroyed by officers at the request of the defendant because it was not accurate. The third tape was much more complete than the first tape and for the first time Smith admitted to carrying a stick which was made to resemble a shotgun. The first and the third tapes were admitted into evidence and played for the jury over the objection of defense counsel and after the trial court refused to suppress those statements.

The defense argues on appeal that the two taped confessions should have been suppressed as being fruits of an unlawful arrest and therefore in violation of his constitutional rights. Defendant relies on the recent U.S. Supreme Court decision in *Payton v. New York, Riddick v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), which held that, absent exigent circumstances, the fourth amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. In the case at bar, there was no warrant secured for the defendant's arrest, and no exigent cir-

cumstances existed, as there was ample time to secure a warrant. The State argues on appeal that there was consent given by Samuel Smith when he opened the door to police officers after they knocked. The record does not support the conclusion that there was consent. Only one officer testified that Samuel Smith consented to the officer's search of the house for his brother. That officer was the one stationed at the back door of the house and he did not go in until called by the officers who had gone to the front door. He could not have known what transpired between the two officers and Samuel Smith at the front door after the officers knocked and entered. The State has not met its burden of proving that there was consent by an occupant of the house. Therefore, if *Payton and Riddick* is applicable to this situation, the arrest of the defendant was unlawful.

Payton and Riddick was decided some 7½ months after the arrest of the defendant. We believe that it is open to question as to whether or not *Payton and Riddick* is to be applied retroactively. See *Michigan v. DeFillippo*, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). However, assuming arguendo that *Payton and Riddick* is controlling, there still remains a reason why this case should be affirmed.

Defendant contends that because the confessions were made pursuant to an unlawful arrest, they therefore were fruits of the poisonous tree which required their suppression. Such a result does not necessarily follow, as we recognized in *State v. Smith*, 207 Neb. 263, 298 N.W.2d 162 (1980). The U.S. Supreme Court has consistently held that not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. The question in such a case is whether the evidence objected to has been discovered by exploitation of the primary illegality or has been instead discovered by means sufficiently distinguishable to be purged of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct.

407, 9 L. Ed. 2d 441 (1963). As the Supreme Court has recognized, it is entirely possible that persons arrested illegally may decide to confess, as an act of free will unaffected by the initial illegality. *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). "The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972), and, particularly, the purpose and flagrancy of the official misconduct are all relevant. See *Wong Sun v. United States*, 371 U.S., at 491. The voluntariness of the statement is a threshold requirement." *Brown v. Illinois*, 422 U.S. at 603-04.

The standards to determine admissibility of statements made after an illegal arrest as set forth in *Brown* were reaffirmed recently in *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). The five factors are: (1) The administration of the *Miranda* warnings to the defendant prior to the statement; (2) The temporal proximity of the arrest and the confession; (3) The intervening circumstances between the initial detention and the challenged statements; (4) The purpose and flagrancy of the official misconduct; and (5) The voluntariness of the statement must be established.

The first statement given by the defendant does not meet the test for admissibility as set forth in *Brown* and *Rawlings*, and should have been suppressed. Although the *Miranda* warnings were given to the defendant prior to the confession and the rights waived, the

temporal proximity of the arrest and the confession is much like the situation in *Brown*. The first statement was separated from the unlawful arrest by approximately 1 hour and there was no intervening event of significance.

The third statement given by defendant, the only other one admitted, was given over 27 hours after the arrest. The *Miranda* warnings were administered to the defendant immediately preceding the statement and were made part of the taped confession. The intervening circumstances were very significant and apparently convinced the defendant to give a more complete statement to clear up inconsistencies. In answer to the question from the interviewer as to whether the confession he was giving was voluntary, Smith answered: "It's a voluntary statement and it's given to the best of my knowledge. I'm not trying, I'm not trying to make it seems like that I'm, you know, just trying to get my ownself off, but I just want the truth, you know. I want my side of the story, 'cause before anybody else, you know, come in here and say, I did this, I did that, you know, which isn't, hey."

It is quite apparent that the final statement was given after the defendant realized that Berrian was telling a different version of the incident and implicating Smith in a manner which Smith wanted cleared up and his "side of the story" known.

The fourth factor to be considered is the purpose and flagrancy of the official misconduct. In this instance, the officers were acting legitimately and under apparent authority of Neb. Rev. Stat. §§ 29-404.02 and 29-411 (Reissue 1979). "Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality . . . ." *Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). As was the situation in *Rawlings*, "the conduct of the police here does not rise to the level of conscious or flagrant misconduct requir-

ing prophylactic exclusion of petitioner's statements." *Rawlings v. Kentucky*, 448 U.S. at 110.

The final factor to consider is whether the voluntariness of the confession has been established. The defendant has not argued on appeal that the confession was involuntary. There is no evidence that the defendant was subjected to any threats or promises or that the statement was coerced in any manner whatsoever. The motivating factor appears to be the defendant's desire to get at the truth and make sure his side of the story was told to avoid any untruthful accusations by Berrian. We believe that the final statement given by the defendant meets the test of *Brown* and the primary taint of the unlawful arrest was purged.

Since we have determined that the final statement of the defendant was correctly admitted into evidence and that statement encompassed everything in the first statement given by the defendant, admission of the first statement was not prejudicial and is therefore harmless error. "Where there is one confession by a defendant properly admitted into evidence and there was strong corroborative evidence of the guilt of the defendant, the admission of another confession, even though it should have been excluded upon objection, is harmless error." *Kelley v. State*, 366 So. 2d 1145, 1150 (Ala. Crim. App. 1979).

In a habeas corpus proceeding before the U.S. Supreme Court, the petitioner challenged the introduction at trial of a pretrial confession he made to a police officer posing as a fellow prisoner. "[P]etitioner sought to have his conviction set aside on the ground that the statements he made to police officer Langford should not have been admitted against him. Our review of the record, however, leaves us with no reasonable doubt that the jury at petitioner's 1958 trial would have reached the same verdict without hearing Langford's testimony. . . . [W]e do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court 14 years ago by use of evidence not chal-

lenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless." *Milton v. Wainwright*, 407 U.S. 371, 377-78, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972).

The third statement of the defendant left no question as to his guilt in this instance. Although neither of the victims could identify the robbers, their testimony corroborated in many details the facts related by Smith. The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., concurs in result.

HERMAN BROS., INC., ET AL., APPELLEES, V. SPECTOR INDUSTRIES, INC., ET AL., APPELLANTS.

308 N.W.2d 720

Filed July 24, 1981. No. 43392.

1. **Public Service Commission: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
2. ____: ____. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.
3. **Public Service Commission: Motor Carriers.** Where commission approval of a transfer of authority is requested under Neb. Rev. Stat. § 75-318 (Reissue 1976), and an issue of dormancy is properly raised, the Nebraska Public Service Commission must determine both the fact of dormancy and, on the basis of the evidence, whether the public convenience and necessity require the transfer.
4. ____: ____. There are no mechanical rules for determining when rights have become dormant, and the test of substantiality must be used to resolve the issue. Pertinent factors include whether the rights involve general or specified commodities, the character of the area served in terms of industry and population, the number of carriers involved in a

similar service, whether the rights are radial or nonradial, and whether the financial and material capabilities of the carrier have been utilized as far as practicable.

Appeal from the Nebraska Public Service Commission. Affirmed.

Rodney Peake of Peake & Navis, P.A., for appellants.

James E. Ryan of Ryan & Williams, P.C., for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and MARTIN, District Judge.

BRODKEY, J.

Peake, Inc. (Peake), a motor carrier incorporated in Nebraska, and Spector Industries, Inc. (Spector), a motor carrier incorporated in Delaware, appellants herein, appeal to this court from an order entered by the Nebraska Public Service Commission denying an application to transfer to Peake the intrastate operating authority issued to Spector. The certificate of authority held by Spector authorized the transportation of bulk cement, limestone, and limestone products between all points in Nebraska over irregular routes. Peake, the wholly owned subsidiary of Ruan Transport Company of Des Moines, Iowa (Ruan), operates under authority to transport petroleum products, molasses, fertilizers, agricultural insecticides, and other chemicals over designated routes in Nebraska. We affirm.

The record in this case indicates that Peake entered into an agreement with Spector whereby Spector would sell its transportation authority to Peake at an agreed price of $20,000, subject to the approval of the Nebraska Public Service Commission. An application requesting authority to transfer Spector's operating rights was filed with the commission in February of 1979. Notice of the application was subsequently published on March 2, 1979, in response to which two formal protests were filed with the commission on March 30, 1979, on behalf

of Herman Bros., Inc., and Dokter Trucking Corporation. On April 24, 1979, the protestants filed a formal complaint alleging that Spector had allowed its certificate of authority to become dormant in that Spector did not perform the services authorized by the certificate. The protestants prayed that the commission revoke the certificate held by Spector. This matter came on for a public hearing before the commission on June 28, 1979, at which time evidence was presented on behalf of the parties herein. On February 12, 1980, the commission entered its order finding that the certificate of authority held by Spector was dormant and that the transfer of the authority to Peake was not supported by a showing of public need. Specifically, the commission found that Spector had entered into lease arrangements with Ruan whereby all shipments made by Spector were transported in equipment owned and operated by Ruan. The commission concluded that these operations were being conducted by Ruan in order to keep the Spector authority active prior to the proposed transfer of the certificate of authority to Peake. The commission held that the lease arrangement resulted in an unlawful use by Ruan of Spector's authority without the requisite approval of the commission as required by statute. In its opinion and findings, the commission stated:

"Mr. Kessler testified that Ruan leased equipment to Spector on a flat-fee basis. The fee was $5.00 per load for the use of the authority. Kessler testified that this was not a normal arrangement in that usually the fee is based on revenue with a split of 60% to 75% depending upon the amount and type of equipment. He characterized that as a 'normal leasing practice[']' insofar as the trucking industry is concerned. The flat-fee of $5.00 per load resulted in a payment of less than 1% of the total revenues derived.

. . . .

"Only minimal traffic has been transported under the authority and that transportation was done by Ruan. In 1977, 14 loads of bulk cement were transported under

the authority in Ruan equipment; in 1978, 45 loads; and in 1979, 24 loads. No loads of bulk cement or limestone were trucked prior to 1977. This means that only 73 [sic] loads of bulk cement have been transported under the subject authority.

"There was no evidence of any limestone traffic moving under the subject certificate nor was there any evidence submitted with respect to any traffic, either cement or limestone, originating at Omaha or Superior, Nebraska.

. . . .

"*In short, Mr. Distefano has described a leasing operation that is about as illegal as one could be.* Article 7 of the Motor Carrier Rules of this Commission require that each equipment lease be filed and approved before the lease becomes operative. The evidence shows that rule was violated. The rules [Section (2) (a) (vi)] require that the lessee have complete control of the equipment and that the lessee assume complete responsibility for the control and use of the equipment. The evidence shows that Ruan used its own equipment without any control being exercised by Spector, used it as it pleased, and hauled under its own insurance, all in violation of the rules. These practices completely negate the aims and purposes of the Motor Carrier Act which is to assure the shipping public that the carrier who undertakes common carriage of a commodity has sufficient insurance in force to cover any losses that might occur

will have direct means of holding the carrier responsible. Spector's operations in concert with Ruan constitute an irresponsible, inept attempt to subvert Section 75-318, R.R.S. 1943 which precludes lease of authority without approval of this Commission." (Emphasis supplied.) (Citations to record omitted.)

The commission found that the loads transported by Ruan under the Spector authority consisted of less than 1/10 of 1 percent of the total loads transported in 1977, less than 4/10 of 1 percent of the loads transported in

1978, and less than 8/10 of 1 percent of the loads available for transport through June of 1979. Evidence in the record also reveals that Spector only made minimal efforts to solicit business, principally through social contacts.

In their brief on appeal, appellants make the following assignments of error: (1) The commission erred in finding that appellants willfully failed to comply with the law; (2) The commission erred in finding the certificate dormant; (3) The commission erred in refusing to transfer the certificate to Peake; (4) The commission erred in completely disregarding the prior decisions of this court regarding this certificate; (5) The commission erred in not issuing the requested order; and (6) The commission erred in misconstruing the purposes and intent of the Nebraska Motor Carrier Act.

The general rule which governs our review in this matter has been stated as follows: "'On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission [now Public Service Commission] administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.' . . . 'The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska State Railway Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.'" *Dahlsten v. Harris*, 191 Neb. 714, 722, 217 N.W.2d 813, 818 (1974). See, also, *Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc.*, 203 Neb. 356, 278 N.W.2d 762 (1979); *Neylon v. Petersen & Petersen, Inc.*, 183 Neb. 813, 164 N.W.2d 452 (1969); *Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc.*, 180 Neb. 764, 145 N.W.2d 584 (1966). It has also been held that where commission approval of a transfer of authority is requested under Neb. Rev. Stat. § 75-318 (Reissue 1976), and an issue of dormancy

is properly raised, the Nebraska Public Service Commission must determine both the fact of dormancy and, on the basis of the evidence, whether the public convenience and necessity require the transfer. *Dahlsten v. Harris, supra.*

Section 75-318 provides that the commission may authorize the transfer of operating rights as follows, in pertinent part: "It shall be lawful, only under the conditions specified in this section, for any motor carrier or nonmotor carrier, or two or more motor carriers to: . . . (2) Purchase, lease, or contract to operate the properties, or any part thereof, certificates, permits or any part thereof, of another motor carrier . . . .

"Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control of the properties, certificates, or permits is proposed, the carrier or carriers or person seeking authority therefor shall present an application to the commission, and thereupon the commission shall notify such carriers and other parties known to have an interest of the time and place for a public hearing in accordance with such rules as the commission shall adopt. If, after such hearing, the commission finds that the transaction proposed will be consistent with the public interest and does not unduly restrict competition and that the applicant is fit, willing, and able to properly perform the proposed service, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control of the properties, or any part thereof, certificates or permits or the whole, or any part thereof, upon such terms and conditions as it shall find to be just and reasonable; *Provided*, that if any of the certificates or permits proposed to be merged, consolidated, transferred, or leased are dormant the commission may approve an application for consolidation, merger, transfer, or lease *only upon proof of and a finding that such merger, consolidation, transfer, or lease is or will be required by the present and future public convenience and necessity*, in the same manner as

provided in section 75-311; *and provided further*, that if the proposed merger, consolidation, transfer, or lease of the certificates or permits will permit or result in a new or different service or operation as to territorial scope than that which is or may be rendered or engaged in by the respective parties, or, as to passenger motor carriers, will tend to enlarge competition over that then existing, the commission may approve such an application for merger, consolidation, transfer, or lease only upon the basis of proof of and a finding that the proposed merger, consolidation, transfer or lease is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-311. Any restrictions, qualifications, or conditions applicable to and contained in a particular certificate of public convenience and necessity or a permit at the time of the issuance thereof or thereafter made a part of such certificate or permit, excluding hereby any restrictions, qualifications, or conditions of general application, applicable to all motor carriers or a segment thereof as a class, and imposed by regulation of the commission, proposed to be merged, consolidated, transferred, or leased shall not be changed, altered, or removed without the proof required in section 75-311 for certificates and permits." (Emphasis supplied.)

The principal issue raised in this appeal is whether the certificate of authority held by Spector is dormant. The determination of the question of dormancy is a difficult one involving many factors. A persuasive and well-reasoned case discussing the various aspects of the problem is *Wright Trucking, Inc., v. United States*, 403 F. Supp. 119 (D. Mass. 1975), where the court held that the underlying premise of "dormancy" in determining whether a motor carrier should be allowed to purchase operating rights held by another carrier is that if the selling carrier's activity has become minimal or nonexistent, the area's shippers are presumed already to be receiving adequate service from other carriers, who will have adjusted their operations to meet these needs,

and that in determining what factors will promote or retard public interest, the Interstate Commerce Commission has authority to adopt a standard of "dormancy" in determining whether a motor carrier should be allowed to purchase the operating rights of another carrier. In that case, the court stated at 120:

"The ICC denied the Wright-Bonded application because it found that Bonded's operating rights had become 'dormant.' Dormancy is a concept the Commission developed in the course of its statutory oversight of the transfer of operating rights. The underlying premise is that if a selling carrier's activity has become minimal or nonexistent, the area's shippers are presumed already to be receiving adequate service from other carriers, who will have adjusted their own operations to meet these needs. *See Gregg Cartage & Storage Co. v. United States*, 316 U.S. 74, 83, 62 S. Ct. 932, 86 L. Ed. 1283 (1942). A purchaser of dormant rights is seen as aggressively seeking to expand the vendor's relinquished business, *C & H Transportation Co.-Purchase (Portion)-Ferguson Trucking Co.*, 93 M.C.C. 741 (1964), thus inciting a struggle among carriers in the area with damage either to 'the public interest or to intervening or protesting carriers who conducted operations during the interruption of said services,' *Arrow Transp. Co. v. United States*, 300 F. Supp. 813, 818 (D.R.I. 1969).

"While dormancy is not a term found either in the statute or in Commission regulations, it is the sort of standard the Commission is authorized to adopt, having plenary responsibility for administering the national transportation policy, and for determining what factors will promote or retard the public interest. *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-88, 64 S. Ct. 370, 88 L. Ed. 544 (1944)."

The rule is well settled in this state that the Public Service Commission may properly consider rulings made by the Interstate Commerce Commission. *Priesendorf Transp., Inc., v. Herman Bros., Inc.*, 169 Neb. 693, 100 N.W.2d 865 (1960); *Abler v. Herman*

Bros., Inc., 187 Neb. 530, 192 N.W.2d 410 (1971). The Interstate Commerce Commission has recognized that there are no mechanical rules for determining when rights have become dormant, and has applied the "test of substantiality" in resolving issues of dormancy. The test is a flexible one. See *New Dixie Lines, Inc.-Control-Jocie Motor Lines, Inc.*, 75 M.C.C. 659 (1958). Pertinent factors involved include whether the rights involve general or specified commodities, the character of the area served in terms of industry and population, the number of carriers involved in a similar service, whether the rights are radial or nonradial, and whether the financial and material capabilities of the carrier have been utilized as far as practicable. See *Miami Transp. Co., Inc., of Ind.-Pur.-Strothman*, 97 M.C.C. 600, 608 (1964). In *Dahlsten v. Harris*, 191 Neb. 714, 217 N.W.2d 813 (1974), we held that where a carrier, holding a certificate of public convenience and necessity for hauling commodities generally or a generic class of commodities over irregular routes, does not perform a portion of such service through no fault of his own, but is ready, able, and willing to do so, the question of dormancy becomes a question of fact under all the circumstances of the case.

The authority sought to be transferred to Peake authorizes the transportation of bulk cement, limestone, and limestone products over irregular routes in Nebraska. The evidence as presented before the Nebraska Public Service Commission established that since 1977 there has been no traffic in limestone or limestone products. Moreover, the only traffic conducted under the Spector authority has been the transportation of bulk cement originating from Louisville, Nebraska. There has been no traffic in bulk cement from Omaha or Superior, Nebraska, the only other possible points of origin for such traffic. As the traffic conducted from Louisville was conducted under a lease agreement entered into between Ruan and Spector, we must focus on the nature of said lease in order to determine

whether it complied with the requirements for a lease as established by the commission.

In this regard, the rules and regulations of the Nebraska Public Service Commission, Ch. III, art. 7, § (2), provide for the procedure to be followed when motor carriers lease equipment. Those rules provide that a written lease agreement is to be signed between the transferor and the transferee, specifying the period for which the written agreement applies and also specifying the compensation to be paid by the transferee for the rental period. Section (2)(a)(vi) further requires that the lease "[p]rovide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the transferee for the duration of the written agreement." Lastly, the rules provide that the lease must be approved by the Nebraska Public Service Commission.

At the hearing it was established that the transportation of bulk cement requires the use of special equipment and that Spector did not own such equipment in Nebraska. Sam Distefano, the terminal manager for Spector, testified that since 1977 the service performed by Spector was made using leased equipment from Ruan. On cross-examination, Distefano testified that Ruan Transport maintained complete control of the trucks being leased to Spector by controlling the drivers of the vehicles, maintaining insurance on the vehicles, and bearing all expenses incurred in the operation of the vehicles. Distefano stated that he, as the transferee, had no control over the drivers or the equipment leased by Spector, and was unable to testify as to whether Ruan had filed the necessary papers in order to operate under the Spector authority. Finally, Distefano conceded that it was possible that Ruan was developing traffic under the Spector authority.

As demonstrated above, the leases entered into between Ruan and Spector clearly violated § (2)(a)(vi) of the commission's rules. Ralph Saathoff, the director of motor transportation for the commission, testified that

the necessary filings that need to be made in order to lease equipment had not been registered with the Public Service Commission. As to the lease arrangement's compensation, the testimony reveals that Spector was paid only $5 per load rather than the 65-35 percent split which was testified to be the normal lease arrangement between leased operators.

Based upon the testimony presented at the hearing, the Public Service Commission found that the only traffic conducted under the Spector authority had been made pursuant to a lease arrangement which violated the commission's rules and regulations. We conclude that the evidence clearly supports the finding by the commission that the lease was unlawful and was entered into as a sham in order to keep the Spector authority active prior to the application of Peake. This being so, we determine that there was an adequate factual basis on which the commission could determine that the authority held by Spector was dormant, and also that the findings of the commission are supported by evidence in the record.

We therefore determine that the order of the Nebraska Public Service Commission should be, and hereby is, affirmed.

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the judgment upon the ground that the operations under the certificate issued to Spector Industries, Inc., were in violation of the regulations of the commission. See *Ace Gas, Inc., v. Peake, Inc.*, 184 Neb. 448, 168 N.W.2d 373 (1969).

IN RE APPLICATION OF BEST. DARRELL F. BEST, DOING BUSINESS AS BEST COMMUNICATIONS, APPELLANT, V. LINCOLN TELEPHONE AND TELEGRAPH COMPANY ET AL., APPELLEES.

308 N.W.2d 726

Filed July 24, 1981. No. 43458.

1. **Public Service Commission: Appeal and Error.** An order of the Nebraska Public Service Commission will be affirmed if the commission acted within the scope of its authority and its order is reasonable and not arbitrary. If there is evidence to sustain the findings of the commission, this court cannot intervene.
2. **Public Service Commission: Telecommunications.** Before granting a certificate of convenience and necessity, the commission must find that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines does not or will not, within a reasonable time, receive reasonably adequate telephone service from the telephone company already serving the territory. Neb. Rev. Stat. § 75-604(2) (Reissue 1976).

Appeal from the Nebraska Public Service Commission. Affirmed.

Jack L. Shultz for appellant.

Paul M. Schudel of Woods, Aitken, Smith, Greer, Overcash & Spangler for appellee Lincoln Telephone.

Scott T. Robertson of Peterson, Bowman & Johanns for appellee Oden.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Darrell F. Best, doing business as Best Communications, the appellant herein, appeals to this court from an order entered by the Nebraska Public Service Commission denying his application for a certificate of public convenience and necessity authorizing the operation of a mobile telephone service to subscribers within a 35-mile radius of 33rd and O Streets in Lincoln, Nebraska. We affirm.

The record in this case reveals that an application requesting the authority to provide the aforementioned service was filed by the appellant with the commission on March 27, 1979. Notice of the application was subsequently published on April 3, 1979. Three formal protests to the granting of the application were filed with the commission on behalf of the Lincoln Telephone and Telegraph Company (LT&T), ATS Mobile Telephone, Inc. (ATS), and Charles P. Oden, doing business as Nebraska Radio Telephone Systems (NRTS). The protestants alleged that they were presently performing adequate service, that the proposed service of the appellant was not required by the public convenience and necessity, and that the granting of the certificate would lead to duplicative service and an inefficient use of the broadcast spectrum.

This matter came on for a public hearing before the commission on July 12, 1979, at which time evidence was presented on behalf of the parties herein. On November 5, 1979, the commission entered its order denying the appellant's application for the certificate of public convenience and necessity. In its order, the commission stated: "We are of the opinion and find that the applicant has failed to show that communications service in the area in question is not and will not within a reasonable time be adequate. Protestant Nebraska Radio Telephone Systems has been authorized to provide service and is proceeding with the installation of its system. There is no evidence in this record that the service to be provided by Nebraska Radio Systems will not be adequate. The application should be denied."

On November 30, 1979, the appellant filed a motion requesting a rehearing on his application. Oral argument on the motion for rehearing was held before the commission on January 3, 1980. The commission entered its order on April 8, 1980, overruling the motion for rehearing, from which order the appellant now appeals to this court. In his brief on appeal, the appellant raises the following assignments of error: (1) That

the Nebraska Public Service Commission acted in an arbitrary and capricious manner in its interpretation of Neb. Rev. Stat. § 75-604 (Reissue 1976); (2) That the commission erred in failing to find that the grant of the application was in the public interest; and (3) That the commission erred in overruling appellant's motion for rehearing.

In *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 372-73, 249 N.W.2d 468, 476 (1977), we stated: "The standard of review in appeals from the Public Service Commission is well established. The order of the Commission will be affirmed if the Commission acted within the scope of its authority and if its order is reasonable and not arbitrary. [Citations omitted.] If there is evidence to sustain the findings of the Commission, this court cannot intervene. [Citation omitted.]"

Section 75-604 provides that no person shall offer telephone service without first making an application to the commission for and receiving from the commission a certificate of public convenience and necessity. In determining whether a certificate should be issued, the statute requires the following: "Before granting a certificate of convenience and necessity, the commission must find that (1) the territory in which the applicant proposes to offer telephone service is not receiving reasonably adequate telephone service, (2) that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines *is not and will not within a reasonable time* receive reasonably adequate telephone service from the telephone company already serving the territory, or (3) the application is agreeable to the subscriber or subscribers and to both telephone companies involved in the matter, will not create a duplication of facilities, and is in the interest of the public and the party or parties requiring telephone service." (Emphasis supplied.)

The evidence contained in the record of the hearing before the commission convinces us that the order of the

commission was not arbitrary or unreasonable. At the hearing the evidence of public need for the appellant's proposed service consisted of testimony from two public witnesses, both of whom are currently subscribers of mobile telephone service from LT&T. Mr. Daniel Cuda and Mr. Robert Stephens both testified that they had encountered a delay in the installation of their mobile telephone systems by LT&T. Both men testified that it was also difficult to gain access to the LT&T system during certain peak usage hours. It appears, however, that the complaints lodged by Cuda and Stephens were prior to the addition of two UHF channels to the mobile telephone service by LT&T. These channels were expected to increase the capacity of LT&T's system by approximately 40 percent.

Moreover, the appellant argues to this court that NRTS should not be recognized as a telephone company already serving the territory, because at the time of the hearing and at the time of oral argument on the motion for rehearing, NRTS was not providing such a service. The evidence in this regard indicates that at the time of the hearing on the instant application, NRTS had been granted authority by the commission to commence its mobile telephone service at a date not earlier than October of 1979. Charles Oden, owner of NRTS, testified that at the time of the Best hearing, technical and engineering studies of the Lincoln area were nearly completed and that a Washington, D.C., firm had been hired to prepare for the necessary FCC licensing applications. Oden also testified that the FCC has allotted a total of seven VHF channels for utilization by radio common carriers, and of the seven channels six were then assigned. The seventh channel has been assigned to NRTS and is allocated to operations in Fremont and Lincoln. As to UHF channels, Oden indicated that 14 channels are allocated for use by common carriers and that 12 were currently assigned by the FCC to users in the area. Oden stated that he intended to apply to the FCC for use of the two remaining channels. At the time

of oral argument before this court, counsel for NRTS stated that the FCC had assigned the channels to the protestant, and that there were no remaining channels in which the appellant could operate without interfering with the other mobile telephone services.

Under § 75-604 the commission is to consider whether the territory into which the applicant proposes to introduce his service is *or within a reasonable time will be* receiving reasonably adequate telephone service from the companies already serving the territory. We believe that the commission properly considered the additional capacity provided through LT&T's expanded system and the new mobile telephone service provided by NRTS. These systems, along with that of ATS mobile telephone, appear to be able to handle the demands placed on the mobile telephone service within the foreseeable future as indicated.

If, after a reasonable time, on the basis of actual experience, it appears that protestants are not able to provide adequate mobile radio service, there would appear to be nothing to prevent appellant from making further application to the Public Service Commission to provide such service.

The evidence in the record supports the commission's finding that reasonably adequate service will probably be available in the territory within a reasonable time. The decision of the Nebraska Public Service Commission was not arbitrary or unreasonable, and must be affirmed.

AFFIRMED.

IN RE INTEREST OF D.
STATE OF NEBRASKA, APPELLEE, V. D.D.M., APPELLANT.

308 N.W.2d 729

Filed July 24, 1981. No. 43505.

1. **Parental Rights.** Rules governing termination of parental rights are intended to recognize the integrity of the family and to bring about parental termination only when that appears to be required and no other reasonable alternative exists.
2. ——. The rule has been long established in this state that courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
3. ——. Courts cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's lifestyle is different or unusual. Neither can a court deprive the parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.

Appeal from the Separate Juvenile Court of Douglas County. Reversed and remanded.

James P. Miller for appellant.

Donald L. Knowles, Douglas County Attorney, and Christopher E. Kelly for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

This is an appeal from an order entered by the separate juvenile court of Douglas County, Nebraska, on March 21, 1980, terminating the parental rights of a mother to her four minor children. In an effort to minimize the notoriety a case of this type may bring to a family, we shall refer to the mother herein simply as "mother" and to the four minor children collectively as "the children." The trial court's order recites that by clear and convincing evidence the mother has failed to meet the requirements of Neb. Rev. Stat. § 43-209 (6)

(Reissue 1978) in that she has failed to correct the conditions leading to the previous determination that the minor children were homeless or destitute or without proper supervision through no fault of the mother, as defined in Neb. Rev. Stat. § 43-202(1) (Reissue 1978). We have reviewed the record de novo as we are required to do in cases of this nature. See, *State v. Worrell*, 198 Neb. 507, 253 N.W.2d 843 (1977); *State v. Kinkner*, 191 Neb. 367, 216 N.W.2d 165 (1974). Our examination of the record leads us to the conclusion that the evidence is not clear and convincing as found by the separate juvenile court, and the order of the separate juvenile court terminating the parental rights of the mother must be reversed.

The instant case presents the conflict which constantly arises between two competing theories. On the one hand, we are confronted with a desire to recognize and protect the integrity of the family unit. On the other hand, we are required and desire to take such action which will be in the best interests of the children involved. Finding that point at which one of those basic theories outweighs the other is a difficult task and one which the most dedicated of courts is not easily able to do.

Undoubtedly, it would be extremely helpful if this court could articulate specific standards and criteria by which determinations are to be made by the juvenile courts to whom these matters are presented. Unfortunately for all, however, such standards are not easy to articulate and it becomes apparent, after just a little experience with the subject, that indeed each case must be decided upon its own facts viewed in light of its own circumstances. The clear situations are never a serious problem for the court. It is those gray areas which pose the serious problem. As for those, we cannot do more than examine the matters on a case-by-case basis. We must, however, keep in mind our recent pronouncement made in the case of *In re Interest of Hill*, 207 Neb. 233, 239, 298 N.W.2d 143, 146 (1980), wherein

we stated that rules governing termination of parental rights "are intended to recognize the integrity of the family and to bring about parental termination only when that appears to be required and no other reasonable alternative exists." See, also, *In re Interest of Holley, ante* p. 437, 308 N.W.2d 341 (1981).

Further, in *State v. Worrell, supra* at 512, 253 N.W.2d at 847, we said: "[T]he rule has been long established in this state that courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. [Citations omitted.] Courts cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's life style is different or unusual. Neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child."

The record in this case upon which the court determined that the evidence was clear and convincing consists principally of letters written to the court by various welfare agents. While the exhibits were received without objection and therefore are properly before the court, there was no opportunity or effort made to cross-examine the authors of the various reports to determine the basis for their conclusions. In addition to the reports, the balance of the record consists principally of colloquies between the court and various state agents as well as the sworn testimony of only the mother. With regard to the state of the record, the court notes that in cases of this nature where the record must establish the justification for the action by clear and convincing evidence, observance of more formal court procedures is to be encouraged. See Neb. Rev. Stat. § 43-206.03(2) (Reissue 1978). In the instant case this court is called upon to examine the record de novo and to make its own findings of fact; and yet it must, to a

large extent, rely upon statements which, if formally offered in evidence and objected to, may be inadmissible. The terminating of parental rights is far too important a matter to be done by informal procedures.

The record discloses that the mother is a 33-year-old divorcee with four children now ranging in age from 4 to 11 years old. The record discloses that her former husband, a Vietnam veteran, was suffering from psychiatric difficulty and having difficulty adjusting to civilian life after being in Vietnam. Frequently he would become violent and physically abuse her. The record further discloses that she was raised in a rural setting where the showing of affection by members of the family was not only frowned upon but prohibited by her father.

In January of 1978, recognizing that she was in need of psychiatric care, the mother voluntarily placed her children with the State Department of Welfare and admitted herself into the Nebraska Psychiatric Institute in hopes that by doing so she might rearrange her life and be able to handle the needs of her children. The record is clear that had the mother not voluntarily sought psychiatric care and voluntarily brought her children to the state, it is not likely that either the state or the separate juvenile court ever would have been made aware of any difficulty or acquired jurisdiction over the children. In March of 1978 a dependency petition was filed, and the children were legally detained by the Douglas County Juvenile Court on April 5, 1978. Between April 5, 1978, and March 21, 1980, the juvenile court retained jurisdiction of this matter, placing the children for a time in foster care, for a time with the mother, and then back again in foster care.

The record fails to disclose any substantial evidence of any physical or mental abuse by the mother toward her children. As a matter of fact, one of the reports filed by a state welfare agent is clearly to the contrary. A report filed December 13, 1978, recites in part: "[Mother] has

demonstrated an excellent ability in handling all of the children's temper tantrums on different occasions . . . .[Mother] also shows the children affection by hugging and kissing them."

While it is apparent from reading the record that the mother is not likely to ever be selected as "housekeeper of the year," it is likewise clear from the record that her lack of housekeeping ability did not establish by clear and convincing evidence that her parental rights should be terminated. Quite to the contrary, the record indicates that while the mother had poor housekeeping habits, she continued to improve when given direction by the various state agencies. Each report indicates a somewhat improved condition over the previous report. And yet the basis for terminating parental rights is that the mother failed to make reasonable efforts under the direction of the court to correct the conditions leading to the determination.

The record would indicate that the mother made significant efforts to improve. It was suggested by the court that she attend Parent Effectiveness Training, and she attended. It was suggested by the court that she seek psychological counseling, and she sought it. It was suggested by the court that she make efforts to learn to be a better housekeeper, and she made such efforts, although admittedly she did not achieve perfection with regard to housekeeping. An example of that is disclosed in a report filed May 23, 1979, by a service officer to the juvenile court. The report analyzed the court's order dated February 7, 1979, and reads in part as follows:

"1) *That the children's mother is allowed reasonable rights of visitation and she is to exercise such visitation rights on a regular basis.*

"[Mother] has maintained regular visitation with her children. Please see the report from Clare Burton, Douglas County Foster Care worker.

"2) *That [child], child herein, shall continue psychotherapy as arranged by Douglas County Social Services.*

"[Child] sees Dr. Chavez every two weeks. Please see the report from Clare Burton.

"3) *That the childrens' mother shall regularly participate in Parent Effectiveness Training Program.*

"Conversation with Del Roper, Director of the Parent Effectiveness Training Program, on May 1, 1979, revealed that [mother] has been participating in the program on a regular basis. She participates in the program with the Omaha Home for Boys Staff. She participates on Wednesday from 9:00 A.M. until 12:00 P.M. Mr. Roper indicated that [mother] participates in the class discussion and she shares her personal experiences with others in the group. Del indicated that he is pleased with [mother's] participation in that group. He indicated that he will send a report to the court.

"4) *That the childrens' mother shall maintain steady full time employment.*

"[Mother] was employed at Lutheran Old Peoples Home from February, 1979 until May, 1979. Her working hours were from 10:30 P.M. until 7:00 A.M. Conversations with [mother] during April, 1979, revealed that sometimes she worked fourteen days in a row without a day off. They were short of help. During May, 1979, [mother] quit her job there. She quit because they wouldn't give her day hours, but her employer did give a co-worker day hours.

"[Mother] started working for the Tupperware Company on May 18, 1979. Conversation with [mother] on June 7, 1979, revealed that [mother] is participating in Tupperwares' manager training once a week. It appears that [mother] would have to be involved in about twenty parties or two thousand dollars worth of tupperware a month to have an income of five hundred dollars for one month. [Mother] indicated that she will bring a statement from her Tupperware distributor.

"5) *That the childrens' mother shall continue regular basis counseling with Mrs. Berit Yank at the Burt Stree [sic] Mental Health Clinic at 20th and Burt, Omaha, Nebraska.*

"Conversation with Berit Yank on April 12, 1979, and May 30, 1979, revealed that [mother] attends counseling on a regular basis. Berit stated that [mother] has developed a trusting relationship with her. Berit indicated that she will send a report to the Court."

It is difficult to understand how it can be suggested from a reading of that report that the mother was not making reasonable efforts to correct the conditions as directed by the court. It is true that there are items contained in the various reports offered to the court which, if standing alone and unexplained, would tend to place the mother in a bad light. Yet there were explanations. While the explanations may not be sufficient to satisfy a member of this court that the mother was the epitome of a housekeeper, they were sufficient to indicate that the mother was not treating the children in such manner that their best interests required the termination of her parental rights. Each succeeding report indicated that while the house was "messy," it was cleaner than it had been on previous occasions. In a report from Child Protective Service to the court dated May 24, 1979, the state worker reported: "[Mother] has been cooperative with me whenever we have had any contact. She has willingly answered any questions I have asked her. [Mother] has attended all her counseling sessions with Berit Yank at the Burt St. Clinic and will soon be starting a third session of the P.E.T. classes with Del Roper."

On June 6, 1979, Clare Burton, foster care worker for the Douglas County Social Services, wrote to the court and said in part: "Over the past few months I feel that [mother] has gained more sensitivity and awareness in interacting with her children. I feel she is beginning to understand how to take time with them individually and talk with them about their concerns. She has shown interest by frequently initiating contact with me regarding the children's foster home and school progress. I feel that her individual therapy and parenting classes have aided in this awareness but feel it vitally im-

portant that she continue in these programs to help her relate with her children."

In a further report dated July 23, 1979, the county service officer reported to the court in part as follows: "A conversation with Berit Yank, therapist at the Burt Stree [sic] Clinic, on July 12, 1979, indicated that [mother] attends therapy on a regular basis, and is doing very well. She is becoming much more open and is beginning to look more deeply at her behavior and also the childrens'. Ms. Yank is presently working with [mother] in terms of keeping a schedule by which to clean her home. She feels that [mother] is ready to have the children on a full time basis. She indicated that she will send a report to the Court."

On July 25, 1979, the therapist did send a report to the court indicating that the mother was indeed doing extremely well. She concluded her report by saying: "We feel that [mother] should be given the opportunity to have her family back and to use the various agencies and organizations as resources rather than judges of her behavior."

On August 6, 1979, the children's guardian ad litem reported to the court about a visit which he made to the home. He concluded the report by saying, "On the whole, my impression was the house was cluttered not filthy. I would recommend that the children be returned and there be constant supervision until it is shown that [mother] can handle the situation. I based this on the fact that she appears to have made progress on a personal level; she has tried to comply with the Court's order; she is trying to keep the house clean; and the weekend visits will prove its [sic] disruptive [to] the children."

And then in February and March of 1980, while continued progress is reflected (though, to be sure, there are instances which many of us would find objectionable), the court terminates her parental rights.

The separate juvenile court seems to find fault with the fact that the mother, while having a gross income of

perhaps never in excess of $500 per month, has not saved any money. There is no evidence, however, to indicate that the money was foolishly spent or that anyone could save money on $500 a month. The court indicated its disapproval that the mother had failed to comply with the court's order which provided that no one was to be present in the home when the children were visiting except for the mother and social workers. It appears that the mother had married and her husband was present. The court criticizes the mother for having her husband present while the children are visiting. There is some indication in the record, developed by conversation rather than by sworn testimony, that perhaps the marriage may not be legally valid. Nevertheless, the trial court seems to totally disregard the fact that the mother attempted to establish a lawful home in which the children could live. We are completely unable to determine the legality or illegality of the marriage based upon the record in this case. We are able to ascertain, however, that the children are extremely fond of the husband and that there is no evidence that his presence was detrimental to their well-being.

An overall examination of the record leads us to the conclusion that there is not sufficient evidence to establish that the best interests of the children are served by terminating parental rights. Quite to the contrary, the evidence is that the children very much love their mother and love each other, and if they are, indeed, having difficulties, some are due to the fact that they are separated from their mother and from each other. While we are not here condoning filth and the lack of good housekeeping standards, we are not prepared to terminate parental rights solely on that basis. The North Dakota Supreme Court, in the case of *In re Kelber*, 51 N.D. 698, 200 N.W. 786 (1924), perhaps captured the problem as well as it can be captured when it wrote: "The parents may not be blessed with intelligence of the highest order, nor with a high degree of education or culture. The law, however, makes no

distinction between the genius and the common man, the educated and ignorant, the refined and the uncouth, the rich and the poor, insofar as the natural right to the custody of offspring is concerned. Every consideration of justice and humanity requires that family ties shall not be lightly sundered. . . . The home and the family, held together by the ties of natural, rather than adoptive, affection, is the last bulwark of American institutions. Poverty, lack of education, or of culture alone are never sufficient justification for severing the ties that bind families together. In this western country, on these western plains, many a home might have been broken where large families were raised by the pioneers in one room cabins of logs, or sod, had poverty, lack of education, or begrimed faces of children, playing on naked mother earth, been the only showing required."

We are convinced that the best interests of these children are not served by terminating parental rights, but quite to the contrary are best served by reestablishing parental rights. To that end, the order of the separate juvenile court terminating the parental rights is reversed and the rights of the mother to her four children reinstated with physical custody of the children restored to the mother, subject to continuing supervision by the appropriate state agency.

Our action in this case should not, however, be construed by anyone, including the mother, as being approval of her manner of caring for her children, but rather our belief that she should be given further opportunity to correct her ways.

Although the mother made sincere efforts to comply with the requirements established by the juvenile court, her compliance in many respects was not satisfactory. There is evidence of substantial neglect of the children in the past. For that reason, it is essential that her custody of the children be under the supervision of an appropriate agency. In the event the children do not

receive adequate care, further proceedings will be necessary.

REVERSED AND REMANDED.

CLINTON, J., participating on briefs.

RAYMOND J. RIHA, APPELLEE, V.
ST. MARY'S CHURCH AND SCHOOL, INC., ET AL.,
APPELLANTS.

308 N.W.2d 734

Filed July 24, 1981. No. 43717.

1. **Workmen's Compensation: Appeal and Error.** The findings of fact made by the compensation court after rehearing will not be set aside on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact made by the Workmen's Compensation Court do not support the award, this court must modify, reverse, or set aside the award.
2. **Workmen's Compensation: Evidence: Proof.** The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment.
3. ____:____:____. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment.
4. ____:____:____. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony.
5. **Expert Witnesses.** The value of an opinion of an expert is no stronger than the facts upon which it is based.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and remanded with directions.

Knudsen, Berkheimer, Beam, Richardson & Endacott for appellants.

James M. Egr of Egr & Birkel for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN,

BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding under the Workmen's Compensation Act. The plaintiff was injured on December 31, 1977, while employed as a custodian and maintenance man by the defendant St. Mary's Church and School, Inc., in David City, Nebraska. While spreading ice remover over the church steps in the course of his employment, the plaintiff slipped and fell. Plaintiff received compensation for an injury to his hip and sought additional compensation in this proceeding for an aggravation of a preexisting condition in his low back.

After a hearing before a single judge, the plaintiff received an award for temporary total disability and medical and hospital expenses. On rehearing before a three-judge panel of the Workmen's Compensation Court, with one judge dissenting, the plaintiff again received an award for temporary total disability and medical and hospital expenses. The court found that the temporary total disability would continue for an indefinite period of time, and in the event the temporary disability ceased, the plaintiff would be entitled to compensation for any permanent partial disability due to the accident and injury. The defendants have appealed.

It is undisputed that the plaintiff was in the course of his employment at the time of his injury on December 31, 1977. The issue which must be determined is whether the evidence will sustain the finding of the Workmen's Compensation Court that the injury arose out of the plaintiff's employment. This question must be determined by an analysis of the medical testimony in the record concerning any causal connection between the fall and the disability of the plaintiff.

The findings of fact made by the compensation court after rehearing will not be set aside on appeal unless clearly wrong. *Meyer v. First United Methodist Church,*

206 Neb. 607, 294 N.W.2d 611 (1980). However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact made by the Workmen's Compensation Court do not support the award, this court must modify, reverse, or set aside the award. Neb. Rev. Stat. § 48-185 (Reissue 1978).

The plaintiff in this case has a long history of back problems dating back to 1954 when he was injured in a fall from a hayrack. In 1958 that injury was diagnosed as an L5-S1 disc injury and a laminectomy was performed.

On January 15, 1963, the plaintiff again injured his back when he slipped and fell on ice. As a result of the 1963 injury a fusion operation at L3-4, L4-5 was performed to relieve nerve root symptoms and instability in his back. Following this surgery the plaintiff testified that he was unable to bend normally and compensated by using his knees and hips when stooping to pick up objects. Dr. Goetowski, the treating surgeon, estimated the plaintiff had a 5 to 10 percent permanent partial disability to the body as a whole following the second surgery.

The evidence is in conflict as to whether the plaintiff experienced back pain following the second surgery. The plaintiff testified he did not have back pain again until after the December 31, 1977, fall. However, plaintiff's treating physician, Dr. Rudolph, indicated that the plaintiff complained of chronic low back pain in 1975. In July 1975 the plaintiff complained of burning pain in his feet and legs. Dr. Miller, as a consulting physician, was of the opinion that the plaintiff's problem was functional.

Following the December 31, 1977, fall, the plaintiff complained of pain in his left hip. X-ray examination on February 24, 1978, disclosed a chip fracture and degenerative arthritis of traumatic origin.

The plaintiff first complained of back pain following the December 1977 fall on April 21, 1978. Dr. Miller

noted at that time, "He has a myriad of complaints including pain in the bones of his feet, tingling in his hands, back pain, leg pain, etc." Dr. Miller could find no organic explanation for the plaintiff's symptoms, and concluded, "I think maybe the symptoms he has are secondary to drug dependency."

On July 11, 1978, the plaintiff's spine was X-rayed. The radiologist reported bony overgrowth bridging L4-5 and L5-S1, but no sign of recent injury.

In November 1978 a myelogram examination was made. Both Dr. Rudolph, plaintiff's personal physician, and Dr. Miller, plaintiff's orthopedic specialist, believed this test indicated a disc injury at the level of the third lumbar vertebra.

Dr. Miller's preoperative diagnosis of plaintiff's condition and its relation to the December 1977 fall was as follows: "Mr. Riha has a great deal of functional overlay as noted by previous psychological examination but we do feel he has objective evidence of a disc problem which is recurrent at the 3rd lumbar level. He had a previously existing problem requiring a laminectomy 15 years ago but did well until *he was injured in December 1977 and I feel this problem eminates [sic] from that injury.* I therefore feel that he had a previously existing problem which was aggravated by the injury in December 1977." (Emphasis supplied.)

On December 29, 1978, the plaintiff again underwent surgery to relieve his condition. The procedure was a decompression, hemilaminectomy at L3-4 level on plaintiff's left side. The operation disclosed, however, that the plaintiff did not have a disc injury but suffered from spinal stenosis, a narrowing of the nerve root canal in the spine, caused by scarring and bony overgrowth and probably caused by his previous surgery.

In January and March of 1979 the plaintiff's complaints of low back pain were dismissed by Dr. Miller as mostly functional.

The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his

disability is the result of an accident arising out of his employment. *Tilghman v. Mills*, 169 Neb. 665, 100 N.W.2d 739 (1960). Moreover, the presence of a pre-existing disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980).

Since the plaintiff's injury was not of an objective nature, expert medical testimony was required to establish a causal connection between the December 1977 fall and the claimed aggravation of a previous injury. *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980); *Mack v. Dale Electronics, Inc.*, *ante* p. 367, 307 N.W.2d 814 (1981). Dr. Rudolph, plaintiff's personal physician, was unable to testify as to a causal connection between the December 1977 fall and plaintiff's recurring back problem. He did testify, however, that spinal stenosis is usually a result of previous surgery.

Although the plaintiff has been examined and treated by many physicians, including neurologists and psychologists, the only medical testimony on causation to support the award to the plaintiff is found in Dr. Miller's December 12, 1978, preoperative diagnosis and a notation Dr. Miller made on January 8, 1980, following a conversation with defendants' attorney. In that notation, Dr. Miller stated: "We were trying to determine whether or not Mr. Riha's problem has eminated [sic] from the injury which he incurred in December 1977 and I do believe in reviewing his records that, although we are referring to 'hip' initially it was the same type pain he has been complaining of all along and is related to the injury of December 1977 although he did have back trouble 15 years prior to that and we would have to say that he had previously existing back problems which was aggravated by his injury. He probably is about 50% disabled now from his back problem."

From this evidence, the single judge determined that the plaintiff had sustained his burden of proof on the

issue of causal connection. On the rehearing, the parties stipulated to the admission into evidence of exhibit 5, an affidavit of Dr. Miller, dated June 3, 1980. The affidavit states in part: "2. On December 29, 1978, I performed surgery on Raymond J. Riha, of David City, Nebraska. A copy of the Surgical Record dated 12-29-78 is attached hereto and made a part hereof. *The postoperative diagnosis contained in that report reflects my present diagnosis of Mr. Riha's problem and supersedes any opinions I have given in reports dated prior to this Affidavit. Said postoperative diagnosis and my present opinion also specifically supersede my notations regarding my conference with Mr. Endacott dated January 8, 1980.*

"3. On the basis of what I discovered at the surgery of 12-29-78, Mr. Riha's back problems were secondary to bony overgrowth and scarring that was the result of previous surgery in the same area of his back rather than the accident involving Mr. Riha which occurred in December of 1977. Said previous surgery occurred about sixteen years prior to December of 1977.

"4. Because of my findings as a result of the surgery performed on 12-29-78, *I cannot now state with a reasonable degree of medical certainty that Mr. Riha's present medical problems with his back are causally related to his accident in December of 1977.*" (Emphasis supplied.)

The three-judge compensation court, in evaluating the weight to be placed on the affidavit, stated: "The evidence is in conflict. We do not regard the later affidavit as binding as a matter of law on the issue of causation. Like other evidence, it may be rejected in favor of contrary evidence. That Dr. Miller's apparent change of opinion is not explained and that the affidavit does not meet head on the doctor's earlier conclusion that plaintiff's complaints are related to and aggravated by the injury of December 1977, are circumstances which detract from the weight to be given the affidavit."

As a general rule, where the record presents nothing

more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court. *Keith v. School Dist. No. 1*, 205 Neb. 631, 289 N.W.2d 196 (1980); *Marion v. American Smelting & Refining Co.*, 192 Neb. 457, 222 N.W.2d 366 (1974). In the present case, however, the only evidence on the issue of causation comes from a single expert witness. If his final statement is accepted, all conflict is eliminated, as his June 3, 1980, opinion expressly "superseded" all earlier opinions.

The value of an opinion of an expert is no stronger than the facts upon which it is based. *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954). In this respect, it is significant to note that the only opinion to incorporate the postoperative diagnosis as the basis of the opinion was the June 3 affidavit.

The record in this case, when considered as a whole, establishes quite clearly that the cause of the plaintiff's present difficulty is unknown. Dr. Rudolph stated frankly that the cause was unknown. The surgery on December 29, 1978, established that the 1977 fall did not result in a disc injury. The operation which was performed was designed to relieve symptoms caused by the narrowing of the nerve root canal due to scar tissue and bony overgrowth resulting from the previous surgery. Perhaps the operation was not successful. Perhaps the plaintiff's pain has no traumatic origin. The evidence is inconclusive. In the present state of the record the only conclusion that can be drawn is that, as a matter of law, the evidence failed to establish that the plaintiff's disability was caused by the 1977 fall.

The probative value of the 1978 preoperative diagnosis was destroyed by the conditions discovered when the surgery was performed. The affidavit of Dr. Miller effectively destroyed any probative value of his January 8, 1980, statement. See *Thelen v. J. C. Penney Co.*, 186 Neb. 53, 180 N.W.2d 693 (1970). The only other postoperative statements by Dr. Miller were that the plaintiff's pain was functional.

The record does not support the findings of the Workmen's Compensation Court. The judgment must therefore be reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissents.

STATE OF NEBRASKA, APPELLEE, V.
FRANK A. AULRICH, APPELLANT.

308 N.W.2d 739

Filed July 24, 1981. No. 43888.

1. **Wiretaps.** Once it is determined that a wiretap is illegal, any evidence derived from the wiretap must be suppressed.
2. **Wiretaps: Constitutional Law.** Neb. Rev. Stat. §§ 86-701 to 86-712 (Reissue 1976) provide their own exclusionary rule which exists separate and independent of any court-created exclusionary rule involving the fourth amendment.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with directions to dismiss.

Kirk E. Naylor, Jr., for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

PER CURIAM.

The appellant, Frank A. Aulrich (Aulrich), appeals from a judgment entered by the District Court for Buffalo County, Nebraska, finding Aulrich guilty of being in possession of a controlled substance in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1979), and

of being a convicted felon in possession of a handgun in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1979), and from the sentences imposed by the court for said convictions. Aulrich maintains that the trial court erred in failing to sustain his motion to suppress certain evidence seized as a result of a search of his residence located in Buffalo County, Nebraska. In the instant case a jury was waived and the case tried to the court on a stipulation of facts. It is clear from the record that if the evidence which Aulrich sought to suppress was in fact suppressed, the convictions could not stand. We have examined the records and files in this case and have concluded that the contention of Aulrich is correct and the judgment must be reversed.

The stipulation of facts entered into between the State and Aulrich at trial discloses in part that on April 2, 1979, Aulrich was serving a term of probation for 2 years pursuant to a sentence by the District Court for Kearney County, Nebraska, for conviction of the offense of felony possession of marijuana. At approximately 9:50 p.m. on April 2, 1979, a member of the Nebraska State Patrol and two officers of the Kearney Police Department entered the trailer where Aulrich was living, and as a result of a search of the trailer they found in the kitchen closet of the residence a Ruger .357-caliber revolver, serial No. 15229515, belonging to Aulrich. It was further stipulated by the parties that the officers found on or in a living room plant table a vial which contained a small amount of white powder. Upon analysis, the powder was confirmed to be cocaine. The parties further stipulated to facts that established that Aulrich had previously been found guilty of a felony offense. Based upon this stipulation, the trial court found Aulrich guilty of both charges.

However, Aulrich entered into the trial stipulation subject to objections which he had earlier raised at a suppression hearing. The record discloses that the parties had likewise entered into an earlier stipulation of facts in connection with a hearing on a motion

to suppress filed by Aulrich. The facts stipulated at the suppression hearing are extremely relevant to the disposition of this matter. The suppression hearing stipulation was to the effect that on April 1, 1979, at 1:19 p.m., officers of the Nebraska State Patrol installed a wiretap on a telephone located at the residence of one David Donathan, a resident of Cass County, Nebraska. As a result of the wiretap, they intercepted a telephone call made by Donathan to Aulrich. The parties further stipulated that the telephone call was intercepted without the knowledge or consent of either Donathan or Aulrich. It was further stipulated by the parties that the contents of the intercepted conversation indicated to the police that there was reason to believe that Aulrich was in possession of marijuana, a controlled substance. According to the stipulation, as a result of the intercepted telephone conversation a member of the Nebraska State Patrol and two officers of the Kearney Police Department undertook to search Aulrich's residence.

The stipulation further provided that the search was carried out without benefit of search or arrest warrant and without any request being made by the officers that Aulrich consent to the search, but based rather upon the provisions of an earlier probation order affecting Aulrich. From the suppression hearing stipulation it is agreed by the parties that on July 27, 1978, Aulrich was placed on probation by the District Court for Kearney County, Nebraska, for a period of 2 years following his conviction for the felony offense possession of marijuana weighing in excess of 1 pound. He agreed in paragraph 11 of the probation order that "as a condition of probation, that said defendant [Aulrich] submit his person and property to search and seizure at any time of the day or night by any law enforcement officer with or without a warrant." The parties further stipulated at the suppression hearing that the search revealed the controlled substance and firearms, more specifically identified by the

parties in the trial stipulation at the time of trial.

The final paragraph of the suppression hearing stipulation provides as follows: "That the interception of the telephone conversation by law enforcement officers, as more specifically referred to within this Stipulation, was unlawful, having been accomplished in violation of the substantive provisions of Sections 86-701 thru 86-707, R.R.S. 1943 (Reissue 1976). More specifically, the wiretap, which was utilized to intercept said conversation, was subsequently found, by District Judge Raymond Case, District Judge of Cass County, Nebraska, and by District Judge William Blue, District Judge of Lancaster County, Nebraska, to have been invalid because said wiretap was conducted without a sufficient prior showing that other investigative procedures had been tried and failed or why said procedures would be unlikely to succeed if tried or would be too dangerous, contrary to the requirements contained in Section 86-705(c), R.R.S. 1943 (Reissue 1976)."

While the State concedes that the wiretap was invalid and unlawful, it nevertheless argues that the invalid wiretap does not affect the subsequent search because the search was made pursuant to the condition of the order of probation. The State's argument is based principally upon a claim that the order of probation is a sufficient attenuating circumstance so as to overcome any violation of the wiretap, and makes the obtaining of the evidence valid and admissible. The State specifically argues in its brief that had there been no wiretap and had no information been obtained from any source which would have led authorities to believe that marijuana was present in the defendant's residence, a warrantless search of the defendant and his property could have been conducted legally pursuant to the probation order. In making such argument the State relies upon our decision in *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980).

The difficulty with the State's argument, however, is

that it chooses to disregard all the provisions of Neb. Rev. Stat. § 86-705(11) (Reissue 1976), which, in clear and concise language, provides in part as follows: "*Any* aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of this state, may move to suppress the contents of any intercepted wire or oral communication, *or evidence derived therefrom*, on the grounds that the communication was unlawfully intercepted . . . . If the motion is granted, the contents of the intercepted wire or oral communication, *or evidence derived therefrom*, shall be treated as having been obtained in violation of sections 86-701 to 86-707." (Emphasis supplied.)

While it is true that the order of probation required Aulrich to consent to warrantless searches of his person or property, it did not require him to consent to the unlawful wiretapping of his telephone or to the waiving of his rights under Neb. Rev. Stat. Ch. 86, art. 7.

Our holding in *State v. Morgan, supra*, was not intended to imply that a waiver by a probationer as to certain rights afforded him under the fourth amendment to the U.S. Constitution constitutes a waiver of all his constitutional and statutory rights. Whether a probationer can, under any circumstance, be required to waive his rights under the provisions of Neb. Rev. Stat. §§ 86-701 to 86-712 (Reissue 1976) is not before us and we need not now consider that matter. The parties have in effect agreed that Aulrich *did not* waive his rights under the act nor consent to the interception of his phone conversations. The stipulation makes it clear that the wiretap was unlawful and was the sole basis upon which the ultimate search was conducted. The State agrees it was motivated to conduct the search solely because of the information it had unlawfully obtained through the wiretap.

The condition of the probation order eliminated any need for obtaining a search warrant. The fact, however, that a search warrant was not needed does not abrogate

the clear prohibitions of the wiretap statute, § 86-705(11). In *State v. Kolosseus*, 198 Neb. 404, 408, 253 N.W.2d 157, 160 (1977), we said: "Federal law preempts the field in the area of interception of oral or wire communications and *prohibits* the use of such intercepted communications *or any evidence derived therefrom* . . . ." (Emphasis supplied.) Once it was determined that the wiretap was illegal, any evidence derived from the wiretap must be suppressed. See, *State v. DiMauro and Kessler*, 205 Neb. 275, 287 N.W.2d 74 (1980); *United States v. Spagnuolo*, 549 F.2d 705 (9th Cir. 1977).

The State may not, on the one hand, seek to obtain the benefits of the wiretap statute while at the same time choosing to ignore the penalties which are imposed upon the State in the event that it should violate the provisions of the act. The Nebraska statutes, §§ 86-701 to 86-712, provide their own exclusionary rule which exists separate and independent of any court-created exclusionary rule involving the fourth amendment. See, *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974); *Gelbard v. United States*, 408 U.S. 41, 92 S. Ct. 2357, 33 L. Ed. 2d 179 (1972).

The trial court should have sustained the motion to suppress the evidence obtained during the search. Once that was done, there was no basis for convicting Aulrich, and the conviction must be reversed and the complaint dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

KRIVOSHA, C.J., concurring in result.

I concur in the result reached by the majority in this case. I believe, however, that this case clearly supports the concerns which I raised in my dissent in *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980). The authorities which have held provisions such as the one included in the order of probation in this case to be invalid, either as violating the fourth amendment of the

U.S. Constitution or as being vague and overbroad, have recognized the difficulty of trying to separate out court-made exclusionary rules involving the fourth amendment and the host of statutory exclusions created by both Congress and our Legislature. In this case an additional effort by the law enforcement officers to make an independent investigation would have permitted them to obtain a warrant and secure the evidence necessary for a conviction. By relying upon broad, vague language in an order of probation and thereby being misled into believing that they may disregard other prohibitions contained in other statutes, the police were caught in their own trap. I believe that we would ultimately produce better law enforcement if we made the provision clear by recognizing that one convicted of a crime, but placed on probation, cannot be required to waive any constitutional right as a condition of being placed on probation, including agreeing to submit to any search with or without probable cause and contrary to the constitutional rights he otherwise would have.

STATE OF NEBRASKA, APPELLANT, V. GLEN MUENCHAU AND JOHN D. BROWN, APPELLEES.

308 N.W.2d 824

Filed July 24, 1981. No. 44332.

Confessions. A statement by an interrogating officer that, if the person being questioned would give a statement to the officer, the officer would advise the county attorney that the person being questioned had cooperated by giving a statement is not such an inducement as to render a statement given under such circumstances involuntary and, therefore, subject to being suppressed.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Reversed and remanded.

Ronald D. Moravec, Cass County Attorney, for appellant.

Roger S. Brink for appellee Brown.

No appearance for appellee Muenchau.

Heard before BOSLAUGH, J.

BOSLAUGH, J.

The State appeals from an order of the District Court of Cass County, Nebraska, suppressing statements made by the appellee Brown to a Lancaster County sheriff's deputy.

An information was filed in the District Court of Cass County alleging the appellee and Glen Muenchau had committed arson by burning a vacant farmhouse near Alvo, Nebraska. Appellee then moved to suppress the statements he had given to the deputy sheriff. After an evidentiary hearing, the trial court granted the suppression motion.

The record of the suppression hearing shows that during late 1980, the Lancaster County sheriff's office and the State Fire Marshal's office were investigating fires of suspicious origin in Lancaster and Cass Counties. Their investigation prompted Lancaster County Deputy Sheriff Robert Marker to contact the appellee and request that he come to the sheriff's office on November 29, 1980, for questioning about a haystack fire near Waverly. When the appellee arrived at the sheriff's office, Deputy Marker advised him of the nature of the questioning, and then informed him of his rights with regard to custodial interrogation as set out in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Appellee indicated that he understood these rights and agreed to make a statement. After some discussion with Deputy Marker, appellee gave an oral statement, later transcribed, in which he admitted involvement in the Waverly haystack fire, but denied any knowledge of the fire near Alvo. Appellee at that time agreed to submit to a polygraph examination.

On December 1, 1980, appellee took the polygraph

examination. After Deputy Marker advised appellee that the results of the examination showed that his statement had not been truthful, appellee made a second statement to Deputy Marker in which he admitted involvement in the Alvo fire.

Before the appellee gave these statements, Deputy Marker had advised the appellee that if he gave a statement Deputy Marker would inform the county attorney's office that appellee had cooperated by giving a statement. At the suppression hearing, Marker testified that "John was told the same thing that we tell anyone else that comes in. We cannot promise him that he will have a lighter sentence, that anything will happen, that normally when a person cooperates with the court, that the court takes that into consideration." The appellee contends that Marker's references to advising the county attorney's office that appellee cooperated was a direct or implied promise and such an inducement as to make appellee's confession involuntary and therefore inadmissible.

In *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), the U.S. Supreme Court held that, to be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. See, also, *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976).

We have held that a confession must be suppressed where a tangible benefit was offered to the defendant in return for an inculpatory statement. For example, in *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979), a police officer advised the 15-year-old defendant "that if the defendant cooperated with the police he would attempt to have the matter transferred to juvenile court." 203 Neb. at 66, 277 N.W.2d at 443. This court held that such a promise "was an inducement which under the circumstances of this case rendered the statement involuntary. . . .

. . . .

"The offer to try to have the case transferred to juvenile court was an inducement to confess in exchange for leniency. . . . [T]he defendant's statement to the Omaha police was given in the hope of receiving some benefit in return and was inadmissible." 203 Neb. at 66-67, 277 N.W.2d at 443.

Here no such benefit was offered to the appellee in return for making a statement. The fact that the defendant had "cooperated" by giving a statement to the deputy sheriff would be readily apparent to the county attorney. In fact, Deputy Marker affirmatively stated that he could not promise the appellee anything. Deputy Marker's remarks were similar to those made by a police detective in *People v. Higgins*, 50 Ill. 2d 221, 278 N.E.2d 68 (1972), *cert. denied* 409 U.S. 855, 93 S. Ct. 195, 34 L. Ed. 2d 100. In *Higgins*, the defendant and several other persons, including his sister, were arrested as suspects in the shooting death of a woman. In the course of a conversation with a police detective, defendant, in response to a question from the detective, asked: "'If I tell the truth would you let the other people go?' Detective Davis answered that he had no authority to release anyone who was arrested and charged and that only the State's Attorney or judge could do so, but that, if defendant told the truth, the State's Attorney would take this into consideration." 50 Ill. 2d at 223, 278 N.E.2d at 70. The Illinois Supreme Court found that these remarks did not render defendant's subsequent inculpatory statement involuntary.

The remarks of Deputy Marker in the present case require the same result. Marker made no promises, direct or implied, of any tangible benefit to the appellee. His remarks contained no element of impermissible inducement on the part of the State which would render appellee's confession involuntary and therefore inadmissible.

The order of the District Court sustaining the motion

to suppress is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

DENNIS D. BEAVERS ET AL., APPELLEES, V.
DONALD D. GRAHAM, APPELLANT,
PHILLIP R. REIFF ET AL., APPELLEES.

308 N.W.2d 826

Filed July 31, 1981. No. 43229.

Appeal and Error: Courts: Jurisdiction. The trial court has no jurisdiction to enter an order after the defendant has perfected his appeal to the Supreme Court.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Monte Taylor of Taylor, Hornstein & Peters for appellant.

Lawrence I. Batt of Garber & Batt for appellees.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and VAN PELT and MARTIN, District Judges.

MARTIN, District Judge.

The plaintiffs, an investment group, brought an action in equity against defendant Donald D. Graham, an investment agent, who held and voted the stock owned by the group, alleging Graham used their funds without authorization, mismanaged the investment, and breached his fiduciary capacity. The trial court entered an order appointing a referee to hold hearings and submit a report on the accounting issue and the question of whether or not a receiver should be appointed. In the report subsequently filed by the referee, Graham was found to owe certain sums on the accounting issue, and the referee recommended no receiver should be appointed. Plaintiffs filed a motion

to adopt the report in part, and excepted to it in part. Defendant Graham filed exceptions to the report as a whole.

A hearing was held on the referee's report on July 12, 1979, and the matter was taken under advisement by the District Court. On September 24, 1979, the referee filed a supplementary report which recommended that Graham be removed as agent for plaintiffs' investment group, reversed his recommendation as to the appointment of a receiver, and made adjustments in the accounting matters.

Defendant Graham excepted to the supplementary report. Plaintiffs again moved to adopt the supplementary report in part, and excepted to it in part.

On November 19, 1979, the District Court held a hearing on the referee's supplementary report and ruled at that time that both the original and the supplementary reports would be adopted in toto. It issued its order on January 22, 1980, removing Graham as agent, appointing a receiver, directing Graham to deliver the assets of plaintiffs to the receiver, and entered judgment against Graham in favor of the individual plaintiffs, as determined by the referee.

Graham moved for a new trial, which was overruled, and on January 31, 1980, filed a notice of appeal to this court.

On February 1, 1980, the District Court held a hearing on plaintiffs' motion for partial summary judgment and judgment on the referee's report as supplemented, which motion was filed January 10, 1980. The motion of the plaintiffs was granted, and on February 8, 1980, an order was entered for partial summary judgment. Defendant Graham then moved for a new trial. The motion was overruled and the defendant filed a supplementary notice of appeal on February 27, 1980.

The assignments of error raised here which require consideration are: (1) Whether or not the District Court erred in adopting the referee's supplementary report; and (2) Was the court without jurisdiction to enter its

order of partial summary judgment after the defendant filed his notice of appeal from the order of January 22, 1980.

The court order appointing a referee was well within the purview of Neb. Rev. Stat. §§ 25-1129 et seq. (Reissue 1979). Defendant Graham argues that the supplementary report of the referee went beyond the original order of appointment. The argument is that the referee was to initiate hearings with regard to the issue of receivership and the issue of accounting, and that because, in his supplementary report, the referee recommended removal of the defendant as agent and the appointment of a receiver, which he had not recommended in the original report, the referee exceeded his authority.

The question of Graham's agency is part and parcel of plaintiffs' case and, we feel, falls within the issue of receivership and was well within the authority originally granted the referee. The argument that his authority was terminated at the time the original report was filed is inconsequential. The report and the supplementary report were not adopted until November 19, 1979, and only after hearings had been held on both reports. The reports when filed had no effect until confirmed by the court. *Citizens Bank of Humphrey v. Stockslager*, 1 Neb. (Unoff.) 799, 96 N.W. 591 (1901).

In this instance the referee's filing of a supplementary report was well within the discretion of the District Court.

A careful reading of the court order of January 22, 1980, and the one signed February 8, 1980, shows very little material differences except that the latter corrects the number of shares involved from 12,000 to 12,900, denies any future compensation for services on behalf of the investment group to defendant Graham, and in slightly different language implements the order of January 22. The legal question involved here concerning the order after appeal has been ruled upon by this court on many occasions and needs no further

clarification in our opinion. The judgment on plaintiffs' motion for summary judgment entered February 8, 1980, was in error and should not have been entered. Neb. Rev. Stat. § 25-1912 (Reissue 1979); *State v. Allen*, 195 Neb. 560, 239 N.W.2d 272 (1976). However, since this is an appeal in an equity action, our duty is to try the issues of fact de novo upon the record. *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978). Our independent review of the record leads us to the conclusion that judgment should be entered for the plaintiffs and against the defendant Donald D. Graham in accordance with the order of the District Court of January 22, 1980, as supplemented by its order of February 8, 1980.

AFFIRMED.

McCOWN, J., concurs in result.

ALLEN BEEBE, SPECIAL ADMINISTRATOR OF THE ESTATE OF LINDA BEEBE, APPELLANT, V. SORENSEN SAND AND GRAVEL COMPANY, CITY OF OMAHA, AND JOSEPH MCGUIRE, APPELLEES.

308 N.W.2d 829

Filed July 31, 1981. No. 43307.

1. **Negligence: Evidence: Proof.** In an action for wrongful death, the plaintiff may establish by a preponderance of the evidence that the wrongful act or omission of the defendant was the proximate cause of death and such connection may be shown by circumstantial evidence.
2. **Motions to Dismiss.** A party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law.
3. **Negligence: Jury Trials.** What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different

circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine.

4. **Motor Vehicles: Highways.** Unless specifically made applicable, the provisions of Neb. Rev. Stat. §§ 39-601 to 39-6,122 (Reissue 1978), except those provisions relative to careless driving and to reckless driving, shall not apply to: (1) Persons, teams of draft animals, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work. Neb. Rev. Stat. § 39-606 (Reissue 1978).
5. **Highways: Words and Phrases.** Whether or not a person is "actually engaged in work upon the surface of a highway" at the time of an alleged occurrence, so as to come under the provisions of Neb. Rev. Stat. § 39-606 (Reissue 1978), may be a question of fact, depending on the circumstances.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Mary Cannon Veed of Matthews & Cannon, P.C., for appellant.

Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas for appellee Sorensen.

Herbert M. Fitle, Omaha City Attorney, and Robert J. Hamer for appellee City.

Wayne J. Mark of Fraser, Stryker, Veach, Vaughn, Muesey, Olson & Boyer, P.C., for appellee McGuire.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Allen Beebe, special administrator of the estate of Linda Beebe, the plaintiff and appellant herein, appeals to this court on behalf of his daughter, Dana Beebe, a minor, from an order entered by the District Court of Douglas County, Nebraska, sustaining the separate motions made at the end of the plaintiff's case by the defendants, Sorensen Sand and Gravel Company (Sorensen), the City of Omaha, and Joseph McGuire, to

dismiss plaintiff's petition against them, or in the alternative to direct a verdict against the plaintiff. On February 6, 1980, the trial judge sustained the defendants' motions and dismissed the petition of the plaintiff against each of them, and thereafter dismissed the jury, which, to that point, had been hearing the case. We reverse and remand for a new trial as to all the defendants except the City of Omaha, and we sustain the action of the trial court in dismissing the City of Omaha, which ruling in favor of the City is not contested by the appellant in this appeal. See *Lynde v. Wurtz*, 147 Neb. 454, 23 N.W.2d 703 (1946).

It appears from the record in this case that on January 15, 1975, at approximately 1 a.m., the decedent, Linda Beebe, was riding as a passenger in an automobile operated by the defendant Joseph McGuire. During the previous evening, January 14, 1975, the couple had dined at a restaurant in Omaha, and later stopped at a lounge where they met some friends and had drinks. At the time of the accident they were proceeding in a southerly direction on the Radial Highway in the vicinity of Seward Street on the way to Linda's home.

It appears from the record that some days prior to the accident in question, Omaha had received a heavy snowfall, and the streets in question were still covered with snow in spots. Defendant McGuire testified at the trial that the Radial Highway was "icy," and also "sloppy" and "wet." McGuire was driving his automobile in the southbound curb lane; and when in the vicinity of Seward, he collided with a snowplow or grader owned and operated by the defendant Sorensen under a contract with the City of Omaha to remove the snow from the streets. At the time of the accident, the snowplow, being described as "Cat 12," was traveling in a northerly direction on the Radial Highway in the southbound curb lane of traffic, the same lane in which McGuire's vehicle was traveling in a southerly direction.

McGuire testified that the collision had affected his memory of what actually happened, and that he had little

recollection of the details of the accident until after the collision occurred. He did remember, however, and testified that he had stopped for a red light before proceeding along the Radial Highway, and definitely stated that he did not see the snowplow at all prior to the accident. Evidence in the record clearly establishes that his automobile struck the grader head on in the southbound curb lane of traffic. McGuire also testified that prior to the accident he was traveling at a speed of approximately 25 m.p.h., and also that he did not recall seeing any flashing lights or other warning signs prior to the accident. His windshield was clean and there was no frost upon it. Although there is no direct evidence in the record that Linda died as the proximate result of the accident, or, for that matter, that she was even dead, the fact remains that her death can hardly be disputed, especially in view of the fact that this action was brought by her special administrator. With reference to the cause of her death, we set out, verbatim, McGuire's testimony as to what happened at that time, and we set out the questions and answers in that interrogation on direct examination: "Q. After you got out of the car did you speak to any of the other people at the scene? A. The first ones that I have — Again, really concrete that I can say that I talked to were the officers, police officers that first arrived and I indicated to them that Linda was in the car; that she was hurt worse than I and they left to deal with her, and other than that I don't really remember speaking to anyone. Q. What had become of Linda? A. She was sitting in the car, head back. As I recall, there was some blood on her forehead, apparently unconscious. Q. Were you then taken to a hospital or — A. Yes. It was, again, right after the blizzard and they were using the big, I believe it's the National Guard's ambulances, things that — two piece units with great big tires and I recall the officers, you know, telling me to get in. Then she was brought on in on the stretcher and the officer had me sit on one seat and brace this stretcher with my feet to keep it from bouncing around in the back of the trailer-

type thing they were using. Yes, we were taken to the hospital at that time. Q. What hospital was that? A. University. Q. Were you injured in this accident? A. Yes. Q. What were your injuries? A. Two or three deep lacerations up here (indicating), and apparently my jaw hit the steering wheel, broke the jaw, broke the bone completely off."

In addition, the evidence also reveals that the windshield of McGuire's automobile was severely cracked and damaged in front of both the driver's seat and the passenger's seat. Linda was taken to the hospital in an ambulance, but the record does not reveal when she died. It is, of course, the general rule in an action to recover for wrongful death that the plaintiff establish by a preponderance of the evidence that the wrongful act or omission of the defendant was the proximate cause of the death. However, it is the general rule that such connection may be shown by circumstantial evidence. See, 25A C.J.S. *Death* § 87 (1966); 22 Am. Jur. 2d *Death* § 222 (1965). Also, the law does not require every fact and circumstance going to make up a case of negligence, or to identify the proximate cause of the injury and death, to be proved by eyewitnesses or positive, direct testimony. 22 Am. Jur. 2d *Death* § 243 (1965). There is sufficient evidence in the record from which a jury could find that the cause of Linda's death was the accident in question.

The snowplow in question was operated at the time of the accident by the witness Stanley Olsen, an employee of the defendant Sorensen. The snowplow in question was 24 feet long, 11 feet high, and 8 feet wide, with a 12-foot blade. It was painted yellow and had, according to pictures received in evidence of the actual plow itself, at least 4 headlights or spotlights upon it, plus a revolving or flashing light on the top of the cab. The type and location of the lights in question were somewhat disputed in the record. However, the evidence establishes that at or near the scene of the accident there were street lights on the Radial Highway, as well as lights from a nearby shopping center. Olsen testified that on that morning he

was operating the snowplow for the City, and that a city inspector was in charge of the snow-cleaning operation and directed the drivers as to which streets should be plowed. Olsen stated that the city inspector told him that he had missed plowing Decatur Street, which was several blocks north of Hamilton Street where he was located at the time he first turned onto the Radial Highway and drove north in the southbound curb lane. Olsen testified that he first observed the car driven by McGuire when it was approximately 200 yards north of him, and that it was coming directly toward his snowplow; that the lights of the car were on; and that the car did not appear to slow down, swerve, or move out of the lane of traffic in which they both were. He testified that at the time of the accident he was going approximately 3 miles per hour. Olsen also testified that the city inspector had told him that he could drive in the southbound lane of traffic in a northerly direction in order to get to the street that he had failed to clean. There is a conflict in the testimony as to whether Olsen had stopped his snowplow prior to the accident. At one point in his testimony he testified that he had stopped, but at another point he testified that he could not recall if he had stopped before the accident.

Larry Erickson, the inspector for the City of Omaha, testified that it was his responsibility to supervise the private contractors who did road work for the City of Omaha. He stated, however, that it was not his function to tell the operators of the snowplows what route they should take. He saw the snowplow shortly before the accident, and testified that it was still moving at that time. He denied in his testimony that he had instructed Olsen to drive northbound in the southbound traffic lane on his way to Decatur Street.

The matter was set for trial by jury in the District Court on February 4, 1980, upon the amended petition of the plaintiff alleging gross negligence under the guest statute against the defendant McGuire, and also alleging various acts of ordinary negligence against the other

defendants. The City of Omaha filed an answer to the amended petition of the plaintiff, and also filed amended cross-claims against the defendants Sorensen and McGuire. The defendant Sorensen filed an amended answer to the amended petition of the plaintiff, and also a cross-claim against McGuire. In the answer filed by the City of Omaha, it alleged that the proximate cause of the collision and injuries to Linda Beebe was the negligence of the defendant Joseph McGuire in failing to keep a proper lookout, in failing to have his vehicle under reasonable control, in failing to yield the right-of-way, in driving his automobile at an excessive rate of speed under the conditions then and there existing, in failing to observe another vehicle clearly within his range of vision, and in driving while under the influence of intoxicating alcohol. In the answer filed by Sorensen, it was alleged that the sole and proximate cause of the accident and decedent's injuries was the negligence of Joseph McGuire in failing to keep a proper lookout, in failing to have his vehicle under reasonable control, in operating his vehicle at an excessive rate of speed under the conditions then and there existing, and in operating his vehicle while under the influence of alcohol. However, in the answer of defendant Joseph McGuire, he alleges that the direct and proximate result of the accident and injuries was the negligence of Stanley Olsen, as imputed to defendant Sorensen, alleging failure to have his vehicle under reasonable control, in failing to yield the right-of-way, in failing to swerve or divert his course of travel so as to avoid the accident, and in failing to have his vehicle equipped with sufficient warning devices as specifically set out in subsequent paragraphs of the answer.

As previously stated, at the close of plaintiff's case, each defendant made a motion for dismissal of plaintiff's petition, or in the alternative for a directed verdict, which motions the trial court thereafter sustained and dismissed the petition against all the defendants.

On appeal, the appellant assigns as error: (1) The trial

court erred in ruling in favor of defendant Sorensen on its motion for a directed verdict on the issue of proximate cause; (2) The trial court erred in finding that no jury question was presented by plaintiff's evidence as to the causal connection between Sorensen's negligence and the plaintiff's injury; (3) The trial court erred in holding that defendant McGuire was not guilty of gross negligence; (4) The trial court erred in holding there was insufficient evidence to create a jury question as to defendant McGuire's negligence; (5) The guest statute is unconstitutional; and (6) The trial court erred in finding that no damages accrued to Dana Beebe as a result of her mother's death.

At this point it will be helpful to review some well-established principles of law applicable to situations such as those present in the instant case: "[A] party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law." *Omaha Nat. Bank v. Omaha P. P. Dist.*, 186 Neb. 6, 9, 180 N.W.2d 229,232 (1970); *Reed v. Reed*, 182 Neb. 136, 153 N.W.2d 356 (1967). "For the purpose of evaluating a motion for a directed verdict or a dismissal of a cause of action, all doubt must be resolved in favor of the party against whom the verdict or dismissal is urged. The truth of all evidence he has submitted must be assumed and he must be given the benefit of all inferences therefrom. The question must be whether, in view of these assumptions, the jury could properly bring in a verdict in his favor." *Jones v. Foutch*, 203 Neb. 246, 252, 278 N.W.2d 572, 576 (1979). See, also, *Bohling v. Farm Bureau Ins. Co.*, 191 Neb. 141, 214 N.W.2d 381 (1974). In *Jones v. Foutch, supra* at 254, 278 N.W.2d at 577, the court also quoted from *Demont v. Mattson*, 188 Neb. 277, 196 N.W.2d 190 (1972), as follows: "'This court has frequently reiterated in slightly varying language that whether

gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. [Citation omitted.] In case of doubt or where reasonable minds might differ the evidence must be resolved in favor of the existence of gross negligence, in which case it is a question for the jury.'"

The above case also cited from our opinion in *Carley v. Meinke*, 181 Neb. 648, 652, 150 N.W.2d 256, 259-60 (1967), in which case the trial court directed a verdict for the defendant and on appeal this court reversed and remanded for a new trial, stating: "It is also true that any one of the foregoing acts of negligence might not, standing alone, constitute gross negligence. . . . 'It is apparent that no one act of the defendant can be separated from the whole of these acts and held to be the independent cause of this accident. Under these circumstances, each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence.'"

In *Komma v. Kreifels*, 144 Neb. 745, 750, 14 N.W.2d 591, 595 (1944), this court stated: "'What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine.'" The rule is also well established that no decision on gross negligence can constitute an absolute precedent in any other case. Each case necessarily differs somewhat in its particular facts and circumstances, and in the composite which results from them. *Liston v. Bradshaw*, 202 Neb. 272, 275

N.W.2d 59 (1979). In the foregoing case, quoting from *Thompson v. Edler*, 138 Neb. 179, 292 N.W. 236 (1940), we also stated at 279, 275 N.W.2d at 63: "'While it may be regrettable that no perfect yardstick for measuring gross negligence has ever been devised, the numerous decisions, which the guest statutes have produced, seem rather clearly to demonstrate that this is as close as it is possible to come to a judicial solution. If the tapeline of past decisions seems at times to be somewhat inaccurately applied, and the processes of logic to be a bit variable in their result, this may be largely because the observer is looking at the facts in isolation and not in context.'" Likewise, in *Olson v. Shellington*, 167 Neb. 564, 571, 94 N.W.2d 20, 25 (1959), we stated: "An issue of gross negligence must be decided from the facts of each case. Such an issue is for the jury if the evidence relating thereto is conflicting and from it reasonable minds might arrive at conflicting conclusions."

We first consider the question of whether the trial court should have dismissed plaintiff's petition against defendant McGuire pursuant to his motion at the end of plaintiff's case. In so doing, the court determined that the evidence against McGuire was insufficient to constitute gross negligence. We believe the trial court erred in this regard, and that there was sufficient evidence in the record to warrant the submission of the question to a jury. Under the rules of law set out above, we believe there is ample evidence in the record to allow reasonable minds to conclude that McGuire was guilty of gross negligence, particularly if the evidence is viewed in the light most favorable to plaintiff's claim against him. We think there is clearly a question as to the sufficiency of McGuire's lookout and observations in view of the size and dimensions of the snowplow in question, which was, according to the evidence, equipped with both stationary and flashing lights, and was painted a yellow color. This is particularly true in view of the fact that the driver of the snowplow had no trouble at all seeing McGuire's approaching automobile when it was approximately 200

yards from where he was stationed. McGuire also testified that his windshield was clean and there was no frost covering it. He merely testified that he did not see the snowplow at all before the collision occurred.

A similar situation was involved in *Boepple v. Mohalt*, 101 Mont. 417, 54 P.2d 857 (1936), where the Supreme Court of that state held that the sole and proximate cause of a collision between an automobile and a road grader was the automobile driver's failure to maintain a proper lookout, and not the alleged failure of the operator of the grader to operate it on the right side of the road or his failure to use adequate warning signs, and that the injured occupant of the automobile was precluded from recovering damages against the operator of the grader. In that case the court stated at 433, 54 P.2d at 861: "The physical facts, as shown by the photographs, together with the evidence, contradict the claims of plaintiff and disclose that there was unquestionably ample room for Boepple to have passed around the grader. This circumstance, together with Boepple's own statement that his eyesight was good, and the evidence showing conclusively that he could have easily stopped or avoided the grader if he had seen it at a distance of 239 feet, lead to the inevitable conclusion that the sole, direct and proximate cause of the accident was Boepple's failure to keep a proper lookout ahead."

We next consider whether there was evidence of unlawful speed to submit to the jury, in addition to the other evidence of negligence, in order to determine whether the individual acts of negligence amounted to gross negligence. While McGuire testified that he was traveling at a speed of approximately 25 m.p.h. prior to the accident, we believe it was properly a matter for the jury to determine from all the facts and circumstances whether that speed, under the conditions then existing, was unreasonable, considering the fact that the highway was snowpacked and icy; that the accident occurred at 1 a.m. in the morning; that there were street lights and other lights in the vicinity; that, as previously stated, the

snowplow was equipped with flashing and stationary lights; and also the evidence that the operator of the snowplow was able to see McGuire over 200 yards away. There would seem to be at least a fact question presented as to whether McGuire could have or should have seen the snowplow approaching him on the wrong side of the road, and whether or not under the circumstances McGuire should not have reduced his speed to accommodate for the surrounding conditions.

Finally, we believe that the jury should have had the additional opportunity to consider the fact that McGuire had been imbibing in intoxicating liquors earlier that evening. While there is no evidence in the record that McGuire was actually intoxicated or that his drinking of beer and wine earlier in the evening affected his driving ability, yet, under our recent case of *Fortin v. Hike*, 205 Neb. 344, 287 N.W.2d 681 (1980), we think it is clear that the jury was entitled to *consider* the fact that McGuire drank the liquor, along with the other evidence in the case. In *Fortin* we pointed out three situations involving the consumption of alcoholic liquor, the first being a situation where there is evidence of consumption of liquor by the operator of a motor vehicle, but an absence of evidence from which the trier of fact might conclude that the drinking affected the safe operation of the vehicle, and no other evidence of any other negligent act. In that situation we laid down the rule that the consumption of alcohol as a negligent act should not be submitted. The second type of situation, pointed out in that opinion, which we believe is applicable to the facts of the instant case, is that: "(2) There is evidence of consumption of alcoholic liquors, accompanied by other evidence of a negligent act or acts which may have proximately caused the accident." *Id.* at 349, 287 N.W.2d at 684-85. In that situation we held at 349-50, 287 N.W.2d at 685: "In the second situation, the consumption of alcohol alone is not evidence of negligence, but may be considered by the trier of fact together with evidence of the other acts

or omissions from which negligence may be inferred....

"Where the evidence is conflicting, of course, the determination of the issue is one for the trier of fact."

The evidence in the record with respect to the lack of lookout on the part of McGuire and the visibility of the snowplow in front of him, as well as the question presented as to the possible excessiveness of his speed under the circumstances, in addition the evidence of his prior consumption of alcoholic liquor, we believe would clearly justify, and in fact require, the submission of the issue of "gross negligence" to the jury before whom the trial was already proceeding.

We now consider whether there is evidence in the record to justify the submission of negligence on the part of Sorensen, or his driver Olsen, to the jury. Admittedly there is a conflict in the evidence in the record as to whether Olsen was directed to drive in a northerly direction in the southbound curb lane to reach Decatur Street, which his supervisor had informed him he had neglected to plow. Olsen stated that he was so directed. His supervisor testified that Olsen was not so directed. In view of the conflicting testimony on this important question of whether he was negligent in driving the snowplow in the wrong direction on the Radial Highway, it was for the jury to determine the issue. It must also be remembered that Olsen testified he first saw the McGuire vehicle coming toward him when he was over 200 yards distant, and that the vehicle came straight at him and did not in any manner attempt to swerve or drive onto the adjacent lane to pass him. There was no evidence that Olsen made any effort whatsoever to avoid the collision.

Sorensen seeks shelter and justification for its actions under the provisions of Neb. Rev. Stat. § 39-606 (Reissue 1978), which provides exceptions to the application of the traffic rules of this state as set out in the statutes. Section 39-606 provides in part: "Unless specifically made applicable, the provisions of sections 39-601 to 39-6,122, except those provisions relative to careless

driving and to reckless driving, shall not apply to: (1) *Persons, teams of draft animals, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work . . . .*" (Emphasis supplied.)

The evidence is clear, notwithstanding the argument by Sorensen to the contrary, that Olsen was changing the location of the operation of the snowplow to a different location than that at which he had previously been working, at the express direction of his supervisor. Sorensen argues that Olsen was still actually engaged in work upon the surface of the highway while so doing. This same issue was presented in the case of *Gonsalves v. Petaluma Bldg. Materials Co.*, 181 Cal. App. 2d 320, 5 Cal. Rptr. 332 (1960), in which case the court held that even though a water truck was merely making a loop to resume work on southbound lanes of a divided highway, the water truck ceased to be "actually engaged in work upon the surface of the road" and commenced "traveling to such work" when it entered a crossover to northbound lanes, and it was not exempted, while in crossovers in northbound lanes, from traffic rules. The court held that the exemptions from traffic rules afforded by statute should not exceed the purpose for which it was enacted, to wit, the release of vehicles "actually engaged" in construction work from traffic laws designed for regulation for normal highway traffic. Likewise, in *Doerle v. State*, 147 So. 2d 776 (La. App. 1962), the Louisiana court held that where a highway crew had completed work on the surface of the highway and was making necessary preparations to move to some other location, a state employee attempting to make a sharp left turn upon the highway was not exempt from traffic regulations under the statute providing that the regulatory provisions do not apply to persons or vehicles actually engaged in work upon the surface of the highway. In *Creamer v. Rude*, 37 Ill. App. 2d 148, 155-56, 185 N.E.2d 345, 348 (1962), the court stated: "We now

turn to defendant's 2d point. A statute of this state provides that the provisions of the Motor Vehicle Act shall not apply to persons operating motor vehicles and other equipment while such persons and/or equipment are actually engaged in work upon the surface of the highway. . . .

"Whether or not a State highway employee is 'actually engaged in work upon the surface of the highway' at the time of an alleged occurrence, so as to come under the provisions of this statute may, or may not, according to the circumstances, *be a question of fact.*" (Emphasis supplied.) See, also, *Cose v. Towner County*, 102 N.W.2d 538 (N.D. 1959); 60A C.J.S *Motor Vehicles* § 371 (1969).

Sorensen relies on the case of *Most v. Cedar County*, 126 Neb. 54, 252 N.W. 465 (1934), as authority for his contention that it was proper for Olsen to operate road maintenance equipment on the left-hand side of the road in the face of traffic, when necessary. We believe *Most* is factually dissimilar to the instant case, as in *Most* the tractor was actually being used for road repair at the time of the collision. The court stated in its opinion at 56-57, 252 N.W. at 466: "Evidence that it was necessary to operate the maintainer on the left-hand side of the road in the face of traffic is uncontradicted. . . . The maintainer was in operation where the county had a right to use it." Under the facts in the instant case, and the authorities above cited, we believe that a fact question existed as to whether at the time of the accident Olsen was "actually engaged in work upon the surface of the highway."

Appellant in his appeal has also questioned the constitutionality of the guest statute. We have previously declared the guest statute in this state to be constitutional. See *Botsch v. Reisdorff*, 193 Neb. 165, 226 N.W.2d 121 (1975). We have recently reached the same conclusion in *Kreifels v. Wurtele*, 206 Neb. 491, 293 N.W.2d 407 (1980). We do not believe it is necessary to consider the issue again. We point out, however, that the guest statute in effect at the time of this collision was re-

pealed by the Nebraska Legislature on March 11, 1981, and a new guest statute was enacted at that time, limiting the application of such statute to parents, grandparents, children, grandchildren, and brothers and sisters.

In view of our conclusion that the trial court erred in sustaining the motions of the defendants to dismiss plaintiff's petition against them, and also our conclusion that the matter must be remanded to the District Court for a new trial as to all defendants except the City of Omaha, we do not at this time discuss the remaining assignments of error.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting in part.

Although it is not clear from the record whether the motor grader was stopped at the time of the collision, the undisputed evidence is that it was traveling at only 3 miles per hour as the McGuire automobile approached it.

Under these circumstances, the fact that the motor grader was traveling in the wrong direction was not a substantial factor in causing the collision and was not a proximate cause of the accident. As this court stated in *Most v. Cedar County*, 126 Neb. 54, 57, 252 N.W. 465, 466 (1934), the motor grader "occupied the same space in the road" whether it was going toward the west or the east.

I would affirm the judgment as to the defendant Sorensen Sand and Gravel Company.

CLINTON and HASTINGS, JJ., join in this dissent.

IN RE INTEREST OF QUENTIN BIRD HEAD, A MINOR CHILD UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA, APPELLEE, V. FREDERICK TAIL, NATURAL FATHER, APPELLANT.

308 N.W.2d 837

Filed July 31, 1981. No. 43743.

1. **Juvenile Courts: Indian Child Welfare Act.** Continued hearings in a proceeding are not subsequent proceedings within the meaning of the Indian Child Welfare Act. 25 U.S.C.A. § 1923 (Supp. 1963 to 1980).
2. **Child Custody: Words and Phrases: Indian Child Welfare Act.** A child custody proceeding includes "any action which results in the termination of the parent-child relationship." 25 U.S.C.A. § 1903 (Supp. 1963 to 1980).
3. **Parental Rights: Notice.** Appellant, who was served with a summons and petition which notified him of the nature and purpose of the proceeding, its possible consequence, and the specific factual allegations on which termination of his parental rights might be based, received adequate notice.
4. **Parental Rights.** An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be based on clear and convincing evidence.
5. **Parental Rights: Appeal and Error.** An action for termination of parental rights is reviewed by this court de novo upon the record.

Appeal from the District Court for Sheridan County: JOHN D. KNAPP, Judge. Affirmed.

Charles Plantz and David J. Clegg for appellant.

Dennis D. King and Terrance O. Waite of the Office of Sheridan County Attorney for appellee.

Michael T. Varn, guardian ad litem.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

Frederick (Freddie) Tail appeals from a judgment by the county court of Sheridan County, sitting as a juvenile court, which terminated his parental rights to his son, Quentin Bird Head. The parental rights of

Martha Bird Head Tail, Quentin's mother, were also terminated by this judgment; she does not appeal.

The petition to terminate parental rights was filed on June 8, 1977, at which time Quentin was approximately 1 year old. It alleged, among other things, that Quentin was a neglected and dependent child within the meaning of Neb. Rev. Stat. § 43-202(2) (Reissue 1978) because: (1) His natural parents did not make adequate provisions for his care throughout the numerous periods during which they were incarcerated for various offenses; and (2) While Quentin was in the custody of his natural parents they repeatedly jeopardized his health and well-being, both through their own use of alcohol and by leaving him in the care of intoxicated persons.

Following adjudication and disposition hearings, the county court found that Quentin was neglected and dependent under § 43-202(2) and terminated the parental rights of his natural parents on July 29, 1977. Both parents appealed to the District Court for Sheridan County, which, on December 22, 1977, upheld the finding that Quentin was neglected and dependent but vacated the termination order, saying that there was insufficient evidence introduced to support it. The matter of disposition was continued in the District Court under Neb. Rev. Stat. § 24-541 (Reissue 1979) pending hearings on the treatment of Martha Bird Head Tail, hereinafter referred to as Martha, and appellant for alcoholism and further evidence by the State. Following two additional hearings, the District Court terminated the parental rights of Martha and appellant.

Appellant contends that the District Court erred in finding: (1) The Indian Child Welfare Act did not apply to this case, hence, the State did not have to meet its procedural and substantive requirements; (2) The notice given appellant on June 10, 1977, was adequate and satisfied his right to procedural due process; and (3) There was clear and convincing evidence introduced to support the termination of appellant's parental rights. We will deal with each assignment of error separately.

The first error raised by the appellant is that the State should have complied with the substantive and procedural requirements of the Indian Child Welfare Act because Quentin is an Indian child eligible for membership in the Pine Ridge Oglala Sioux Indian Reservation. The Indian Child Welfare Act provides: "None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child." 25 U.S.C.A. § 1923 (Supp. 1963 to 1980).

The petition to terminate the appellant's parental rights was filed on June 8, 1977, nearly 2 years prior to May 7, 1979, the effective date of the Indian Child Welfare Act. Likewise, the judgment of the District Court vacating the county court's termination order and continuing the issue of disposition, filed on January 4, 1978, predated the effective date of the Indian Child Welfare Act by more than a year. The District Court also held a disposition hearing on October 30, 1978, 6 months prior to the effective date of the act, which was continued until February 12, 1980.

Appellant argues that the dispositional hearing held on February 12, 1980, was a subsequent proceeding in the matter of termination as provided by 25 U.S.C.A. § 1923. We do not agree. The hearing of February 12, 1980, was a continuation of the one held October 30, 1978, which was itself continued from the hearing held December 22, 1977, following the appeal to the District Court. Continuations of a proceeding are not subsequent proceedings under 25 U.S.C.A. § 1923. *Matter of T. J. D.*, __Mont.__, 615 P.2d 212 (1980).

The following analysis will illustrate how this proceeding was continued from June 8, 1977, to February

12, 1980. Neb. Rev. Stat. § 43-206.03(3) and (4) (Reissue 1978) provides: "(3) At the hearing the court shall first consider only the question of whether the minor is a person described by section 43-202. This shall be known as the adjudication. After hearing the evidence on such question, the court shall make a finding and adjudication entered in the minutes based on proof . . . by a preponderance of the evidence whether or not the child is a person described by subdivision (1) or (2) of section 43-202.

"(4) If the court shall find that the child named in the petition is not within the provisions of section 43-202 it shall dismiss the case. If the court finds that the child named in the petition is such a child, it shall make and enter its finding and adjudication accordingly, designating which subdivision or subdivisions of section 43-202 such child is within; the court shall then proceed to an inquiry into the proper disposition to be made of such child. Strict rules of evidence shall not be applied at any dispositional hearing."

Under these provisions, juvenile proceedings are bifurcated into adjudication and disposition hearings. These hearings may be initiated pursuant to separate pleadings, e.g., a petition praying for adjudication which, if granted, may be followed by a motion for disposition. In such a case the juvenile court will first hear the petition for adjudication and base its findings on the allegations therein. Later, if the petition is granted, the juvenile court will hold a subsequent proceeding on the motion for disposition, basing its determination on the allegations pled in the motion. In the case now before us, however, the petition filed on June 8, 1977, prayed for both adjudication and disposition. The county court conducted an adjudication hearing on the allegations made in the petition. After finding that Quentin was a neglected and dependent child within the meaning of § 43-202(2), the county court continued its proceeding on the petition, held a disposition hearing on the allegations therein, and terminated the parent-child relation-

ship between Quentin and his natural parents.

The natural parents appealed to the District Court under § 24-541. Section 24-541 authorizes District Courts to receive additional evidence necessary for the determination of factual issues. In the instant case the District Court invoked this power, continued the disposition proceeding to February 12, 1980, and rendered a decision, dated June 16, 1980, on the original petition filed June 8, 1977.

Each of the hearings before the county and District Courts was conducted on the allegations pled in the original petition. The Indian Child Welfare Act defines a "child custody proceeding" to include "termination of parental rights" which shall mean "any action resulting in the termination of the parent-child relationship." 25 U.S.C.A. § 1903 (Supp. 1963 to 1980). Construing this definition together with the language concerning "subsequent proceedings" in 25 U.S.C.A. § 1923, we conclude that the case before us constituted a single action initiated by the June 8, 1977, petition. This action or proceeding resulted in termination of the parent-child relationship on June 16, 1980.

The second error assigned by appellant is that he was denied procedural due process because he received insufficient notice concerning the nature and purpose of the proceeding, its possible consequence, the factual basis underlying the allegations made in the petition, and the legal standard governing termination of parental rights.

The record shows that appellant was served with a summons and the petition before the commencement of this proceeding. These documents notified him as to the nature and purpose of the proceeding, its possible consequence, and the specific factual allegations on which termination might be based. He was present at the proceeding in county court and was represented by counsel at all stages of the proceeding.

Furthermore, appellant did not challenge the sufficiency of the notice he received in any manner prior to

this appeal. We have held that failure to challenge the sufficiency of either notice or the pleadings at trial where the defendant participates on the merits of the cause of action waives any defect in the notice or pleadings. *State v. Best*, 173 Neb. 483, 113 N.W.2d 650 (1962); 72 C.J.S. *Process* § 113 b. (1951).

Finally, appellant contends that the evidence presented to support the termination of his parental rights did not meet the standard of being clear and convincing. *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981). A summary of the evidence in the record is necessary for an analysis of this contention.

During their marriage, Martha, Quentin, and appellant had no permanent residence. Between April 1977 and April 1978 they lived for lengthy periods in Gordon, Nebraska, with Tom Plenty Wounds, Martha's uncle. Several other individuals, who are also related to Martha, resided at the Plenty Wounds home on a regular basis during the same period that Martha, Quentin, and appellant did. These individuals, Martha, and appellant were often intoxicated and frequently incarcerated for alcohol-related offenses, according to the testimony of Jim Talbot, sheriff of Sheridan County, and Ernest Justesen, a Gordon police officer. Martha testified that appellant was and remains an alcoholic.

There is evidence in the record to indicate that Tom Plenty Wounds was the major source of support for Martha, appellant, Quentin, and the other relatives who lived in the Plenty Wounds home. Tom Plenty Wounds, rather than Martha or appellant, purchased the basic items which Quentin required during the time that Quentin and his natural parents lived in the Plenty Wounds home.

Justesen testified that Quentin was left by his parents in the custody of intoxicated persons who endangered his safety more than once. Justesen related two such instances. On May 19, 1977, at about 10 p.m., Justesen arrested appellant and Martha, who were both inebri-

ated, near the Gordon city park. Later that night, Justesen located Quentin on the chest of Albert Bird Head, his uncle, who was passed out in a roadside ditch as a result of intoxication. On another occasion, appellant and Martha, who were both intoxicated, took Quentin with them to a local rendering plant where they became involved in an altercation. Gunshots were fired during the course of this conflict.

Both appellant and Martha were convicted of and incarcerated for numerous alcohol-related offenses. For example, appellant was sentenced to 60 days for assault on September 30, 1977; a fine for intoxication on December 1, 1977; 90 days for assault on January 9, 1978; and 5-7 years for assault with intent to do great bodily harm, to run consecutively with 1 year for assaulting or resisting a law enforcement officer, on March 10, 1978. Martha spent 171 days in jail between July 1976 and June 1977 for various alcohol-related offenses. During these periods until June 15, 1977, Quentin was left in the care of Martha's relatives. On that date the county court held its first hearing concerning the petition filed on June 8, 1977. Following this hearing the court ordered that Quentin be placed in a foster home pending further hearings. Quentin was placed with a foster family on September 16, 1977.

Visitations between appellant, Martha, and Quentin were first scheduled on February 18, 1978. On one occasion, Martha took Quentin to visit appellant, who was in jail. During May 1978 appellant began serving a sentence in the Nebraska penitentiary. On September 7, 1978, appellant wrote to Michael T. Varn, guardian ad litem for Quentin, from prison. Appellant inquired about Quentin's status in this letter and suggested that his oldest brother, Cleve Tail, be given custody of Quentin. Near Christmas 1979, appellant wrote to Mary York, a maintenance worker for the Sheridan County welfare office, and asked her if she would deliver a Christmas gift to Quentin from him. During January 1980 she delivered another gift, some beadwork

appellant made for Quentin.

Other than the above-mentioned visit, two letters, and the two gifts, appellant has had no contact with or concerning Quentin since January 1978.

Neb. Rev. Stat. § 43-209(4) (Reissue 1978) provides that parental rights may be terminated when "[t]he parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs . . . which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child."

An appeal from an order terminating parental rights is heard de novo upon the record. The findings of fact by the trial court will be accorded great weight because the trial court heard and observed both the parties and witnesses. The findings of fact made by the trial court will not be set aside on appeal unless they are clearly against the weight of the evidence or there was a clear abuse of discretion. *State v. Jenkins*, 198 Neb. 311, 252 N.W.2d 280 (1977); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981).

In the case now before us, the District Court found that Quentin was a neglected, dependent child because of the habit, i.e., alcoholism, of his natural parents. The evidence contained in the record was sufficient to establish clearly and convincingly that appellant was unfit by reason of habitual use of intoxicating liquor to discharge his parental responsibilities and that his failure to do so was seriously detrimental to Quentin's health and well-being. The record reveals no attempt by appellant prior to his incarceration in the Nebraska Penal and Correctional Complex to alter his habitual abuse of liquor. Given appellant's habit and the lack of evidence that he has conquered it, the best interests of Quentin were served by terminating the parental relationship.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. STEVEN M. LOVELESS, APPELLANT.

308 N.W.2d 842

Filed July 31, 1981. No. 43852.

1. **Tape Recordings.** Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid.
2. ——. Unless the unintelligible portions of a tape recording are so substantial as to render the recording as a whole untrustworthy, the recording is admissible and the decision whether to admit it should be left to the sound discretion of the trial judge.
3. **Rules of Evidence: Expert Witnesses.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Neb. Rev. Stat. § 27-702 (Reissue 1979).
4. **Aiding and Abetting.** Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Affirmed.

Joseph L. Vacca, Esquire, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

PER CURIAM.

Steven M. Loveless, the defendant and appellant herein, appeals to this court from his conviction in the District Court of Washington County, Nebraska, of the crime of possession of burglary tools in violation of Neb. Rev. Stat. § 28-508 (Reissue 1979). The case was tried before a jury commencing on September 15, 1980. The

jury found the defendant guilty of the charge. On October 20, 1980, Loveless appeared before the District Court for trial on count II of the information, which charged him with being a habitual criminal. The defendant was found not guilty on that charge, and the habitual criminal charge was dismissed. On November 3, 1980, the trial court sentenced Loveless to a term of imprisonment for 1 year in the Nebraska Penal and Correctional Complex, less credit for 9 days spent in the Washington County jail while awaiting disposition of this case. We affirm.

The background against which this case arises involves two incidents and trips made by the defendant Loveless and two acquaintances of his, Herschell Gitchell and Martin Kulakofsky, who allegedly drove to Blair, Nebraska, from Missouri Valley, Iowa. The first visit occurred during the evening hours of Saturday, January 12, and the early morning hours of Sunday, January 13, 1980; and the second visit occurred during the evening hours of Sunday, January 13, 1980, and the early morning hours of Monday, January 14, 1980. This appeal involves only the defendant, Steven Loveless, who was charged and convicted of the offense of possession of burglary tools, as stated above. Although, in his brief on appeal, the defendant makes four separate assignments of error, the principal contentions involved herein are that the court erred in allowing, over defendant's objections, a certain tape recording to be played to the jury when the recording was inaudible in portions and difficult to understand, and also that the court erred in allowing a witness, Officer Warden, to testify as to his interpretation of certain portions of the tape in question. The record reveals that during the trial of the defendant, the jury was allowed to hear the aforesaid tape recording of an alleged conversation between Kulakofsky and Gitchell, which was introduced by the State apparently for the purpose of establishing the presence of Loveless in Blair, Nebraska, during the evening of January 12, 1980, and the early morning

hours of January 13, 1980. In addition to the tape recording itself, a typed transcript of the tape was received in evidence for the jury's consideration.

Without setting out in detail at this point the facts leading up to the visit of the three men to Blair on the evening of January 12, 1980, it appears that at approximately 3 a.m. on the morning of January 13, 1980, Kulakofsky and Gitchell were detained by members of the Blair Police Department at a location outside of Blair, Nebraska, on Highway 30. They were suspected by the police of possible criminal activity, and were placed in the back seat of a police cruiser and left alone, during which time the police conducted an on-the-site investigation. At the time Officer Warden of the Blair Police Department left Kulakofsky and Gitchell alone in the police cruiser, he had left a microcassette tape recorder operating on the front seat of the cruiser. It was this cassette which recorded the conversation between Kulakofsky and Gitchell, and which was offered and received in evidence at the trial. Later that morning, Kulakofsky and Gitchell were released by the police and left Blair to return to Iowa where they allegedly found Loveless walking on the Iowa side of the Missouri River bridge. The record further reveals that in the evening of that same day, January 13, 1980, Gitchell went to the defendant's home in Missouri Valley, Iowa, and requested a ride to Blair for the purpose of retrieving a screwdriver and crowbar which he had abandoned in a ditch along Highway 30 at the time he was originally detained by the police. Loveless then drove Gitchell to the spot along Highway 30, and they retrieved the tools from the ditch. Gitchell placed the tools on the floorboard in front of the passenger seat in Loveless' car and commenced to leave, but they were stopped by the Blair police and subsequently arrested for possession of burglary tools.

The testimony given by the three men at the trial was widely divergent and, in spots, very contradictory. Loveless testified at the trial that he had accompanied

Kulakofsky and Gitchell to Blair on the first night; that they had gone to a bar outside of Blair; and that a disagreement arose, following which he left the bar and commenced walking back to Missouri Valley, Iowa. He stated he did not see Kulakofsky or Gitchell again until several hours later, when they picked him up in Iowa.

Kulakofsky testified, however, that during the evening of January 12, 1980, he and Gitchell had driven from Council Bluffs to Loveless' home in Missouri Valley, Iowa, and that while at the Loveless home the three men discussed plans to go to Blair that evening and bulgarize either the Pizza Hut or a bowling alley. For the purpose of effecting an entry to the place of business, they took with them a crowbar and a screwdriver, which were later identified by a witness as falling within the category of "burglary tools." They also took with them two walkie-talkies to use for communication purposes during the commission of the burglary. The three men drove to Blair in Gitchell's car, and had the burglary tools and walkie-talkies with them inside the car. According to Kulakofsky, when they arrived in Blair they drove past the bowling alley and Pizza Hut and went to the Plum Tree Lounge. The three men later left the lounge, and Kulakofsky drove the car to a dirt road and let Gitchell and Loveless out of the car with the crowbar and screwdriver and one of the walkie-talkies. According to the plan formulated earlier that evening in Loveless' home in Missouri Valley, Kulakofsky was to act as the "look-out" man and was to remain in the car until the others communicated with him on the walkie-talkie with directions to pick them up. Kulakofsky testified that he became concerned when his walkie-talkie did not work, and after a period of time he began driving up and down the highway looking for his companions. He was stopped by Officer Warden and ticketed for failure to have a registration for the car. He subsequently located Gitchell who had also been stopped by the police; and, as previously stated, they were both placed in the police cruiser where

their conversation was recorded. They were later released and were driving back to Iowa when they allegedly located the defendant on the Iowa side of the bridge. Subsequent to picking up the defendant, there was conversation in the automobile about Gitchell and Loveless returning to Blair the next evening to retrieve the crowbar and screwdriver which had been deposited in the ditch. Kulakofsky denied there was any argument between the men while they were at the Plum Tree Lounge.

Gitchell testified at the trial that he had deposited the crowbar and screwdriver in the ditch when he saw the police; that he had intended to burglarize the Pizza Hut on either night if the conditions were favorable; and that he intended to use the crowbar and screwdriver for that purpose. Police Officer Hale of the Blair Police Department identified an exhibit as being part of a "lockhouse" which he removed from the Pizza Hut door on January 14, 1980, after the defendant had been arrested. Esley Kotschwar, firearms and tool mark examiner of the Nebraska State Patrol, testified he had examined the crowbar and the lockhouse from the Pizza Hut and expressed the opinion that the crowbar admitted into evidence was used to make the tool marks on the door latch plate.

The State offered into evidence at the trial a tape recording of the conversation between Gitchell and Kulakofsky in the rear seat of the police cruiser, for the apparent purpose of rebutting defendant Loveless' testimony that he had been walking home to Iowa at the time his companions were detained and had no intention of burglarizing businesses in Blair. The trial court held hearings on two motions to suppress the tape, which motions were overruled. At the trial the tape was admitted into evidence as exhibit 14 and played to the jury, and a transcript of the tape, prepared by Officer Warden who had listened to the tape over 50 times, was also received into evidence and submitted to the jury. Although certain portions of the tape were inaudible, as

evidenced by the notations of the court reporter, it appears that other portions of the tape were audible, and were even transcribed by the court reporter who heard them played in the courtroom. Of particular importance is the conversation between Kulakofsky and Gitchell while talking in the back seat of the police cruiser, with the tape recorder sitting on the front seat. Both the tape and the written transcript prepared by Officer Warden reveal that Kulakofsky asked Gitchell, "Where'd Steve go?" and Gitchell replied, "Down in the hole down there," to which response Kulakofsky stated, "Okay that's cool." Also, according to Officer Warden's transcript, at that time Kulakofsky asked Gitchell, "Where's the bars?" and Gitchell replied, "Steve's got 'em." The tape and transcript would seem to indicate, as reflected above, that Loveless may not have been walking home to Iowa as he claimed in his testimony.

Officer Warden testified that exhibit 15 was a transcript he made of the tape in question on January 14, and also testified: "I've used this type of tape recording for the past two years and I've transcribed a number of tapes that I've recorded in certain cases, including this tape here, particular tape, I've transcribed, written it out. I have listened to this tape probably 50 times." The court then stated, "Well, with that basis, I'll let you proceed and you'll have the right to bring in anything else that you want to."

The defendant contends on appeal that Officer Warden was not an expert in the field of making or transcribing sound recordings and, therefore, his testimony, particularly with regard to the interpretation of certain portions of the tape in question, should have been excluded. We point out, however, notwithstanding the lack of formal training in connection with the preparation and interpretation of sound recordings, that to be considered an expert it is not necessary that one have such formal training; actual practical experience in the field can also qualify one as an expert in that field. This fact is recognized by the new evidence

rules adopted in this state. Neb. Rev. Stat. § 27-702 (Reissue 1979) provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training, or education,* may testify thereto in the form of an opinion or otherwise." (Emphasis supplied.)

It is a well-established rule of law that tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid. *State v. Myers,* 190 Neb. 146, 206 N.W.2d 851 (1973); *State v. Lynch,* 196 Neb. 372, 243 N.W.2d 62 (1976). In 29 Am. Jur. 2d *Evidence* § 436 (1967), it is stated: "The fact that a recording may not reproduce an entire conversation, or may be indistinct or inaudible in part, has usually been held not to require its exclusion; however, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said. It has been held that unless the unintelligible portions of a tape recording are so substantial as to render the recording as a whole untrustworthy, the recording is admissible and the decision whether to admit it should be left to the sound discretion of the trial judge." We are unable to determine from the record in this case exactly how much of the tape recording in question was inaudible, but it is clear that certain material parts were audible and were recorded by the court reporter on the playback of the tapes in the courtroom, both at the hearings on the motions to quash and during the trial itself. There is nothing in the record to indicate that the trial court in any way abused its discretion in refusing to suppress the evidence in question and in admitting the tape into evidence at the trial, particularly in view of the testimony of Officer Warden that he had had considerable experience in tape recording conversations and had, in fact, studied and replayed this particular tape at least

50 times.

Defendant contends, however, that it was not proper for Warden to testify and explain his interpretation and conclusions as to certain portions of the tape in which the words were, at least to a certain extent, inaudible and unclear. There is no question, and there are a legion of cases so holding, that one who was present and who heard the conversation in question at the time the recording was made may testify for the purpose of clarifying inaudible or unintelligible portions of the tape. However, as the defendant in this case points out, Officer Warden was not present at the time the conversation between Gitchell and Kulakofsky occurred in the rear seat of the police cruiser, and hence defendant contends Warden should not be permitted to testify as to the contents of the tape recording in question. This same question was addressed in the case of *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976). In that case the court permitted the testimony of an expert in tape identification to point out alleged errors in the government's transcript of the conversation in question. The court also in its opinion pointed out the reasons for the necessity of the use of a transcript of a tape recording, stating: "The need or desire for transcripts arises generally from two circumstances. First, portions of a tape may be relatively inaudible. Second, without the aid of a transcript, it may be difficult to identify the speakers. In either of these cases, it has been said that it is within the discretion of the trial court to allow a transcript to be used by the jury *'to assist the jury as it listens to the tape.'* . . .

. . . .

"It is therefore incorrect to think of the transcripts as simply an 'aid' — as better lighting fixtures in the courtroom would be an 'aid' to the jury's vision of witnesses — and not as evidence of any kind. They are evidence and, like other evidence, may be admitted for a limited purpose only. That purpose here, as the court outlined in its special instruction, was primarily to establish the

identity of the speakers at any particular time." *Id.* at 947.

Since it is permissible for experts to testify with regard to the contents of sound recordings, and since we have concluded that, notwithstanding his lack of formal training in the field, Officer Warden, by virtue of his experience, was in fact an expert, we conclude that the trial court, in the exercise of its judicial discretion, did not err in admitting into evidence the tape and the transcript thereof in question, and the same was properly heard and considered by the jury in its deliberations. The weight to be given to the evidence contained in the tape recording and transcript was, we believe, properly a matter for the jury's determination.

We have dealt at some length in this opinion with the question raised by the defendant with reference to the admissibility of the tape recording and the transcript thereof, and of the evidence of Officer Warden at the trial with reference thereto. We are convinced, however, even apart from the question of the admissibility of the tape recording in question, that there is sufficient other evidence in the record to affirm the conviction and sentence of the defendant on the charge of possession of burglar's tools. Section 28-508 defines that crime as follows: "(1) A person commits the offense of possession of burglar's tools if: (a) He knowingly possesses any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking; and (b) He intends to use the explosive, tool, instrument, or article, *or knows some person intends ultimately to use it,* in the commission of an offense of the nature described in subdivision (1)(a) of this section." (Emphasis supplied.) It is clear that to commit an offense under the above statute it is not required that the burglary or similar offense actually take place.

When instructing the jury in this case, the court in-

cluded in its instructions one on "aiding and abetting." Neb. Rev. Stat. § 28-206 (Reissue 1979) provides: "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." This provision contained in the new Criminal Code is substantially similar to Neb. Rev. Stat. § 28-201 (Reissue 1975), upon which instruction NJI 14.12 is based. That instruction was approved by this court at the time of the adoption of the Nebraska Jury Instructions in 1969. The instruction given by the court substantially followed the language of NJI 14.12 and provided, among other things: "Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. *Mere encouragement or assistance is sufficient.*" (Emphasis supplied.) There is strong evidence in the record from which the jury could conclude that on the evening of January 12, 1980, the defendant and his companions met at the defendant's home in Missouri Valley, Iowa, and at that time agreed to go to Blair, Nebraska, to burglarize the Pizza Hut or a bowling alley; that pursuant to such agreement all three individuals drove to Blair in Gitchell's automobile; that at the time they were driving to Blair for the aforesaid purpose and with the aforesaid intent, they had in the car and in their possession a crowbar and a screwdriver, later established by testimony to be burglar's tools, and also two walkie-talkies; that notwithstanding the conflicting evidence as to who actually owned the tools in question or under whose control the tools were while being transported in the automobile, it is clear that such tools were, during that trip, in the actual or constructive possession of at least one or more of the occupants of the automobile, or in the joint possession of all of them. There is also evidence from which the jury could find that the defendant went to Blair with knowledge of the purpose of the

trip and aided, abetted, assisted, and encouraged the commission of the crime, which, in this case, was charged to be the unlawful possession of burglar's tools. Loveless accompanied Gitchell and Kulakofsky on the trip with obvious knowledge, in view of their previous conversation, that one of them intended to use the tools in question to burglarize a business establishment. It would seem clear that during the trip from Iowa to Nebraska Loveless was in either actual, constructive, or joint possession of the burglary tools with knowledge of their intended use. See, *Phillips v. State*, 154 Neb. 790, 49 N.W.2d 698 (1951); *Kennedy v. State*, 171 Neb. 160, 105 N.W.2d 710 (1960). In *State v. Woodruff*, 205 Neb. 638, 288 N.W.2d 754 (1980), we held that constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the controlled substance at the time of the arrest or by the showing of ownership, dominion, and right of control of an automobile in which the contraband was found. There is little question but that burglary tools would also fall within the definition of "contraband." See, also, *State v. Matthews*, 205 Neb. 709, 289 N.W.2d 542 (1980). The evidence reveals Gitchell and Kulakofsky drove from Council Bluffs, Iowa, to Missouri Valley, Iowa, in Kulakofsky's automobile; however, in making the trip from Missouri Valley to Blair, Nebraska, they drove over in Gitchell's automobile. The second night the trip was made in Loveless' car. However, in view of the fact that Gitchell was the owner of, and had dominion and control over, his automobile on the way to Blair, Nebraska, on the first night and would therefore, under the circumstances, be guilty of possession of burglar's tools, we believe that Loveless would also be guilty as a principal under the aiding and abetting statute above quoted. In *State v. Walker*, 187 Neb. 482, 191 N.W.2d 817 (1971), we stated that a common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances

surrounding the act and from the defendant's conduct subsequent thereto, and that participation in the criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed. We are of the opinion, therefore, that even considering only the events of the first night in which the defendant and his companions planned the commission of the burglary in Blair and made the trip to Blair in the automobile containing the burglary tools, there was sufficient evidence to sustain the verdict of the jury in convicting the defendant of the crime with which he was charged, even disregarding the issue raised as to the admissibility of the tape recording.

We conclude, therefore, that the judgment and sentence of the trial court were correct and must be affirmed.

AFFIRMED.

WHITE and HASTINGS, JJ., concur in result.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. In the first instance, I have some difficulty concluding that the evidence was sufficient to submit the case to the jury on a charge of aiding and abetting the possession of burglar's tools. In my view, the evidence falls short of being sufficient to show the necessary knowledge on the part of the defendant to convict him of aiding and abetting the possession of burglar's tools.

But that is not the basis upon which I find the greatest conflict between myself and the majority in this case. I believe that the tape offered in evidence purporting to consist of a conversation between Kulakofsky and Gitchell was not only inaudible in places but, where audible, was unintelligible insofar as it could in any way be interpreted to concern a conversation about the defendant. The difficulty with the majority's position, as I view it, is twofold. I know of no basis upon which one may be an expert in the unintelligible. To be sure, there are experts with regard to the inaudible. The police

officer in this case did not possess the necessary criteria to be considered an expert in discerning and sifting out inaudible sounds on a tape recording. Rather, he simply supplied the missing terms in order to make understandable what was otherwise an unintelligible sentence.

In *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 305-07, 275 N.W.2d 77, 81 (1979), we said: "That rule [§ 27-705], however, does not in and of itself permit anyone to qualify as an expert upon his own declaration or to render any opinion he desires.

"Before an expert opinion can be rendered, it must be shown that such opinion is of a scientific, technical, or other specialized knowledge which will assist the trier of fact to understand the evidence or to determine a fact in issue, and that the witness qualifies as such expert by knowledge, skill, experience, training, or education. § 27-702, R.R.S. 1943. There is no exact standard for fixing the qualifications of an expert or skilled witness. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc., 189 Neb. 247, 202 N.W.2d 191. Such a witness will be deemed qualified if and only if he possesses special skill or knowledge respecting the subject matter involved so superior to that of men in general as to make his formation of a judgment a fact of probative value. Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601.

. . . .

"The record is this case is totally devoid of any evidence that an expert in weather would attempt to render an opinion such as that sought to be tendered by appellant's expert herein; or that the information relied upon by the expert was of such type that an expert on weather would rely upon such information in rendering an opinion. In the absence of such evidence we agree with the trial court that any opinion tendered by the expert in this case would be based on pure speculation and be solely without any basis or foundation."

To the same effect, it would appear from the record herein that one does not become an expert on the unin-

telligible simply by having listened to a particular tape over 50 times. The evidence, as I view it, fails to establish that the officer in question had any more ability to understand the tapes than any other lay person. The simple fact of the matter is that the tape was clearly inadmissible and should have been excluded, based upon lack of foundation in addition to the fact that it was plain error to permit its introduction on the basis of hearsay.

The majority has in part resolved this problem by suggesting that the introduction of the tape, even if inadmissible, was harmless error due to the fact that there was sufficient other evidence to convict the accused. I do not believe we can say that the introduction of a tape which is apparently relied upon by the State for the purpose of establishing the credibility of a State's witness where there is a conflict in the evidence can be considered as harmless error. We have no way of looking into the minds of the jury to determine what bit of evidence may have been the deciding factor. Certainly a tape purporting to be a discussion by the witnesses whose testimonies are in conflict is significant.

Though the accused may be guilty, he is nevertheless entitled to a fair trial. I am unable to say that the introduction of the tapes was harmless beyond a reasonable doubt. Being unable to say that, I would have granted a new trial.

I am authorized to state that McCOWN, J., joins in this dissent.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 2088, APPELLEE, V. COUNTY OF DOUGLAS ET AL., APPELLANTS.

309 N.W.2d 65

Filed August 7, 1981. No. 43141.

SUPPLEMENTAL OPINION

Appeal from the Nebraska Commission of Industrial Relations. Reversed and remanded with directions.

Nelson & Harding, Donald L. Knowles, Douglas County Attorney, H. L. Wendt, and John J. Reefe, Jr., for appellants.

John B. Ashford of Bradford & Coenen for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

In argument on the motion for rehearing, appellee maintains that the language of our opinion previously adopted and appearing at 208 Neb. 511, 304 N.W.2d 368 (1981), with regard to the obligation of the public employer to the public employee over subsequent years' raises, is ambiguous. In an effort to clarify our position, we substitute the following language to our opinion, in lieu of that language which now appears as the last full paragraph of the opinion:

It is the holding of this court that once a public employer has established a rate of pay for the performance of a particular job in a specific year by granting an across-the-board, cost-of-living wage increase to a group of employees, it may not withhold paying that salary to an employee of the classification granted the raise and performing that work, who would otherwise be entitled to payment at the increased rate of pay, solely on the basis that at the time the payment should otherwise be made the public employer and the bargaining representative of the employee

are then engaged in a labor dispute. By so declaring, we intend that the wage which should be paid to a public employee by a public employer during a dispute is that wage which the public employer has declared as the appropriate wage to be paid and which it would otherwise agree to pay the public employee if no dispute then existed. As an example, if in the instant case all county welfare employees were granted an increase of 7 percent across the board as a cost-of-living wage increase, the county may not pay the increase to nondisputing employees while escrowing the funds belonging to disputing employees until the dispute is terminated. Such a declaration may, in fact, cause some disputes to become moot. It would occur to us that that would be in keeping with the policy of the entire act and consistent with the Legislature's desire that the public policy of this state be such that there be no interruption of public service. The order of the CIR in the instant case is reversed and the cause remanded for further proceedings in accordance with this opinion, if necessary.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I respectfully dissent from the original as well as the supplemental opinion issued after we heard arguments on the motion for rehearing. The issue of whether or not granting a raise to certain county employees not members of the union involved in the current controversy was not raised by either party in the case, nor was it considered by the Commission of Industrial Relations, and the evidence with respect to it was extremely limited, to say the least. The opinion, with respect to that issue, begins by saying: "Though it was not raised by either party, the record discloses that Douglas County may have granted to county employees not members of AFSCME a raise but withheld the same to members of AFSCME because of the existence of a labor dispute. We believe such

practice is both improper and illegal."

The response of the union to the motion for rehearing sets out what apparently is the entire record on the subject of the evidence on the issue. See p. 4, union's response. It will be noted that the employees referred to in the testimony are employees who are *not* in the bargaining unit involved in the current litigation, and the answer of the county's witness indicated that all employees of the county, whether in or out of any particular bargaining unit, apparently received a 7 percent wage increase where there was no labor dispute in progress or wage issues being negotiated.

What we have done in effect is to hold that whenever any group of employees of the governmental unit receives a wage increase, union employees in any bargaining unit involved in a wage dispute must receive the same increase as the nondisputing employees, and receive it in the same amounts and in the same across-the-board fashion.

The court's opinion also does not contemplate that there may be different bargaining years for labor contracts and that different and multiple bargaining units may be involved. As the motion for rehearing points out, our opinion uses the terms "members of AFSCME," "employees," and "disputing employees" almost interchangeably. The opinion also refers to wages in dispute "in a given year" and disputes "over a previous year's wages." It is obvious that there may be multiple bargaining units represented by unions in some cases, no unions in others, and, in many cases, where the bargaining unit may contain a mixture of union and nonunion employees.

It seems to me a more critical factor involved here may be that in selecting an issue that was not raised by the parties nor considered by the Commission of Industrial Relations, and doing so under our plain error rule, we pass on an issue which is, initially at least, an issue for the Commission of Industrial Relations. Neb. Rev. Stat. § 48-819.01 (Cum. Supp.

1980). The question of what is an unfair labor practice is a question which should be first raised in the Commission of Industrial Relations, and generally the Commission of Industrial Relations ought to have an opportunity to pass on the issue before this court reviews it. Such an issue ought to be fully covered by the evidence and argued by counsel before we undertake to get into it. Section 48-819.01 was enacted as a consequence of our holding in *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979). In that case we held that the Commission of Industrial Relations had no authority "to make findings with regard to unfair labor practices or direct a public employer to take any more action than is necessary to preserve and protect the status of the parties' property and public interest involved pending final determination of the issues." (Syllabus of the court.)

If every across-the-board raise granted by a governmental employer to employees in one bargaining unit not then involved in wage negotiations must be immediately passed on to every employee of every bargaining unit in across-the-board fashion, the governmental employer has lost virtually all its bargaining power. Every union or employee representative will feel entirely free to proceed with labor controversies and wage negotiations on every occasion because they have absolutely nothing to lose.

Such a broad holding is contrary to the provisions of the act which requires the Commission of Industrial Relations to determine and fix *comparable* wages.

We have consistently held that the determination of the terms and conditions of employment is a legislative function. *Orleans Education Assn. v. School Dist. of Orleans*, 193 Neb. 675, 229 N.W.2d 172 (1975). We have on our own initiative taken steps to confine the commission to its proper role under the Constitution and statutes. *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102

(1979); *Saltz v. School Dist. of Norfolk*, 208 Neb. 740, 305 N.W.2d 635 (1981). It is inconsistent and illegal for us to usurp the function of the Commission of Industrial Relations on review by injecting a matter not an issue and on which, in any event, the commission has jurisdiction to pass on initially. Indeed, what the court has done is, if we may borrow a phrase from Mr. Justice Byron White, "a raw exercise of judicial power," i.e., without authority in law.

Even if this were an appeal from a court and involved a matter strictly judicial, there is no precedent which supports what we do here. We are not in this case merely saying a wrong principle of law has been relied upon, but say to the parties, in effect: This was not an issue made by the pleading or the evidence, nonetheless, we make it an issue.

CLAIRE SCHEIDELER, APPELLANT, V. H. F. ELIAS AND THE LUTHERAN HOSPITAL SOCIETY, INC., OF BEATRICE, NEBRASKA, APPELLEES.

309 N.W.2d 67

Filed August 7, 1981. No. 43316.

1. **Summary Judgment.** The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the trial court must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt.
2. **Releases: Tort-feasors.** A release by an injured party of the tort-feasor responsible for the original injury does not, in the absence of language indicative of such an intention on the part of the parties, preclude an action by the injured party against a physician or hospital for negligent treatment of the original injury.
3. ____: ____. Two factors are controlling in determining the effect of an agreement purporting to operate as a release: (1) Whether the injured party has received full satisfaction; and (2) Whether the parties intended

that the release be in full satisfaction of the injured party's claim, thus releasing all successive tort-feasors from liability. Such questions are for the trier of fact to decide.

Appeal from the District Court for Gage County: WILLIAM F. COLWELL, Judge. Reversed and remanded.

Galloway, Wiegers, Sprouse & Heeney and K. E. Mahlin for appellant.

Knudsen, Berkheimer, Beam, Richardson & Endacott for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Claire Scheideler, the plaintiff and appellant herein, appeals to this court from a judgment entered by the District Court of Gage County, Nebraska, sustaining the joint motion of the defendants, H. F. Elias, M.D., and The Lutheran Hospital Society, Inc., of Beatrice, Nebraska, for summary judgment. We reverse and remand.

The factual background of this appeal is as follows. On June 17, 1974, the appellant was injured when the motorcycle he was riding collided with an automobile driven by Mrs. Lois Saathoff. The appellant received numerous lacerations and abrasions to his body and suffered a severe compound fracture of the right fibula. Scheideler was subsequently transported by ambulance to the Lutheran Hospital in Beatrice, Nebraska. Upon admission to the hospital, the appellant was treated by Dr. H. F. Elias.

Scheideler was hospitalized at Beatrice from June 17, 1974, through July 26, 1974, when he was dismissed to go home for a 2-day weekend. The appellant returned to the hospital on July 29, 1974, and remained under the care of Dr. Elias until he was finally discharged on August 26, 1974. Thereafter, the appellant was referred to a physical therapist for outpatient treat-

ment. According to Scheideler, the physical therapist discovered that the appellant's right leg was an inch shorter than his left leg, and referred him back to Dr. Elias. On September 23, 1974, it was discovered that the appellant's right hip was dislocated. Dr. Elias referred Scheideler to an orthopedic surgeon in Lincoln, Nebraska, Dr. Gene Lewallen.

Scheideler was hospitalized at Bryan Memorial Hospital in Lincoln on October 4, 1974, where he was put into traction prior to surgery on his hip. On October 9, 1974, the appellant underwent a Charnley-Mueller total hip replacement in which his hip was reduced and replaced by a prosthesis. Scheideler was discharged from the hospital on October 21, 1974, and subsequently released by his surgeon, Dr. Lewallen, on September 9, 1975.

During the first week of his hospitalization at Lutheran Hospital in Beatrice following the June 17, 1974, accident, Scheideler was contacted by Rodney Arnett, a representative of the liability insurance carrier which insured Lois Saathoff, the driver of the vehicle which collided with the appellant's motorcycle. From that date until June 24, 1975, Scheideler and Arnett had continuing negotiations regarding the appellant's personal injury claim against the Saathoffs. On June 24, 1975, Scheideler signed a release in settlement of his claim against the Saathoffs and all others who "are or might be liable," for a consideration of $46,600.

This action commenced on June 11, 1976, when the appellant filed his petition alleging negligence on the part of the appellees in treating his injuries and in failing to diagnose the dislocated hip. Also named as a defendant to this action was Dr. Patrick Gillespie, a radiologist in Beatrice. Dr. Gillespie was subsequently dismissed as a party defendant upon oral application of the appellant. In their amended answer, Dr. Elias and the Lutheran Hospital alleged that the settlement and release executed by the appellant constituted a re-

lease of all claims asserted by Scheideler, thereby barring his claims against them as a matter of law.

Dr. Elias and the Lutheran Hospital filed a joint motion for summary judgment with the trial court; and on December 7, 1979, at the hearing on the motion, the court file containing all pleadings and discovery documents, the deposition of Claire Scheideler taken on August 2, 1977, and an affidavit of Claire Scheideler was received into evidence by the District Court. At the conclusion of the hearing, all parties stipulated on the record that judgment could be entered at chambers without further notification to the parties. On December 13, 1979, the District Court entered judgment granting the motion for summary judgment and dismissing the petition against both defendants. A subsequent motion for new trial was overruled by the trial court, and the appellant now appeals to this court.

In his brief on appeal, the appellant makes the following assignments of error: (1) The court erred in adopting as a rule of law that the defendant health care providers were not liable to the appellant because of his release of the original tort-feasor; (2) The court erred in not finding that the acts or failure to act on the part of the defendants represented a separate cause of action from any which the appellant had against the Saathoffs; (3) The court erred in finding that the release acknowledged full payment of all special and general damages sustained by the appellant; (4) The court erred in finding that there was no issue of material fact as to the release signed by appellant; (5) The court erred in finding there was no failure of meeting of the minds as to the nature and purpose of the release; (6) The court erred in applying the theory of law that contribution between joint tort-feasors should release all wrongdoers; and (7) The court erred in granting summary judgment in favor of the defendants as a matter of law.

The well-established rule governing the scope of

review by this court of a summary judgment has been stated as follows: "'The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the trial court must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn from the evidence.'" *McDowell v. Rural Water Dist. No. 2*, 204 Neb. 401, 410, 282 N.W.2d 594, 599 (1979). This court has also held that summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. *Metro. Tech. Community College v. South Omaha Industrial Park*, 207 Neb. 472, 299 N.W.2d 535 (1980). Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. *Barnes v. Milligan*, 196 Neb. 50, 241 N.W.2d 508 (1976); *Farro v. Rubottom*, 202 Neb. 120, 274 N.W.2d 149 (1979).

The primary issue raised on appeal is whether the complete release of an original tort-feasor bars an injured person from subsequently recovering from a treating physician for alleged acts of malpractice or negligent hospital treatment. The general release signed by Scheideler was a preprinted form containing blank spaces only for the amount of the consideration paid for the settlement, the names of the parties, the dates of the accident or occurrence for which the release was given, the location of the accident in question, and the date of the release, in addition to blank spaces for the signatures of the parties executing the release. The release in question, signed on June 24, 1975, by Scheideler, provided in pertinent part as follows: "RELEASE IN FULL FOR THE SOLE AND ONLY CONSIDERATION OF FORTY SIX THOUSAND SIX HUNDRED and no/100----(Dollars) ($46,600.00) to me/us paid, receipt of which is hereby

acknowledged, I/we hereby release and discharge William A. Saathoff and Lois Saathoff his successors and assigns, *and all other persons, firms or corporations who are or might be liable,* from all claims of any kind or character which I/we have or might have against him or them, and especially because of all damages, losses or injuries to person or property, or both, whether developed or undeveloped, known or unknown, resulting or to result from accident on or about the 17th day of June, 1974, at 1 mile west Highway 77 on State Line County road, Kansas-Nebraska line. and I/we *hereby acknowledge full settlement and satisfaction of all claims of whatever kind or character which I/we may have against him or them* by reason of the above mentioned damages, losses or injuries." (Emphasis supplied.)

In its judgment entered in this matter, the trial court, citing an annotation in 39 A.L.R.3d 26 (actually 39 A.L.R.3d 260, 263 (1971)), adopted and quoted the following: "As a general rule, it has been recognized that a tortfeasor is liable for the consequences of the negligence, mistake, or lack of skill of a physician or surgeon attending the injured person, if the injured person exercised reasonable care in securing the services of a competent physician or surgeon, the reasoning being that the additional harm is either (1) a part of the original injury, (2) the natural and probable consequence of the tort-feasor's original negligence, or (3) the normal incidence of medical care necessitated by the tortfeasor's original negligence."

The trial court, in affirming the motion for summary judgment, found: "3. Prior to June 24, 1975, the plaintiff had possible claims against Saathoff, defendants and all other persons or institutions involved in his treatment and care that he may have claimed to be wrongdoers. 4. Plaintiff during all of the negotiations for settlement and at the time the Release was executed was represented by counsel. Plaintiff was not overreached

or mislead [sic] in any way to the end that there was a mistake or failure of meeting of the minds as to the nature and purpose of the Release. The evidence shows without contradiction that plaintiff by his release acknowledges that it was in payment in full of the charges made by both defendants, and that the sum of $30,673.79 included in the settlement claim was for general damages suffered by plaintiff, but was not itemized. 5. There is no issue of material fact as to the Release dated June 24, 1975, being a full release of any claim that plaintiff had against Saathoff by reason of the collision between the vehicles, and, further, that it was a full release of any claim plaintiff had against defendants, or either of them, for care and treatment during 1974. To hold otherwise would destroy the procedure of negotiation and settlement of similar claims, overlapping of claims and damages, and leave open the possible liability of third persons who render treatment in circumstances similar to this case, but were not named in the Release. Plaintiff had an option to negotiate the Release on a limited liability basis, but he elected otherwise."

As is apparent from analysis of the cases by the editor of the annotation entitled Release of One Responsible for Injury as Affecting Liability of Physician or Surgeon for Negligent Treatment of Injury, found at 39 A.L.R.3d 260 (1971), there are two separate and distinct, and in some respects conflicting, rules of law which have been followed by various jurisdictions with reference to the legal issues presented in this case. The first rule of law, which was based upon the common law, is that a general release executed in favor of one responsible for plaintiff's original injury, at least in the absence of a different intention positively revealed by the language or circumstances of the release, or of a finding that negligence by the physician or surgeon produced an entirely new injury, precludes an ordinary negligence action against the physician or surgeon for damages incurred by his negligent treatment of the

injury. This rule has been generally referred to as the traditional rule. The traditional rule is subject to an exception that a release does not bar the injured party from recovery where a new injury has been produced through the physician's or surgeon's negligence. The second rule, followed by a substantial and increasing number of jurisdictions, is that the release by an injured party of the one responsible for the injury does not, of itself, in the absence of language indicative of such an intention on the part of the parties, preclude an action by the injured party against the physician or surgeon for negligent treatment of the injury, at least unless there has been full compensation in fact for the injured party's total injury. We do not believe that this court has heretofore passed upon or adopted one of the foregoing rules as applicable in this state. Both of these rules are set out, analyzed, and evaluated at some length in the A.L.R.3d annotation previously referred to. In *Thornton v. Charleston Area Medical Ctr.*, 213 S.E.2d 102, 107-08 (W. Va. 1975), that court reviewed the annotation and stated as follows:

"The rule as reconstructed by the writer from an annotation found at 39 A.L.R.3d 260 (1971), is characterized as the 'traditional' resolution and is summarized as follows:

"'A general release executed in favor of the one responsible for a plaintiff's original injury, in the absence of a different intention positively revealed by the language or circumstances of the release, precludes an ordinary negligence action against a physician or hospital for damages incurred by their negligent treatment or medical care of the original injury.'

"In this composite form the rule is substantially followed in the following jurisdictions: Poltera v. Garlington, 489 P.2d 334 (Colo. App. 1971); Feinstone v. Allison Hospital, Inc., 106 Fla. 302, 143 So. 251 (1932); Tidwell v. Smith, 27 Ill. App. 2d 63, 169 N.E.2d 157 (1960); Staehlin v. Hochdoerfer, 235 S.W. 1060

(Mo. 1921); Mainfort v. Giannestras, 49 Ohio Ops. 440, 111 N.E.2d 692 (Ohio Com. Pl. 1951); Farrar v. Wolfe, 357 P.2d 1005 (Okl. 1960); Williams v. Dale, 139 Or. 105, 8 P.2d 578 (1932); Thompson v. Fox, 326 Pa. 209, 192 A. 107, 112 A.L.R. 550 (1937); and Corbett v. Clarke, 187 Va. 222, 46 S.E.2d 327 (1948).

"On the other hand, the result reached by this Court in the recent Cox v. Turner case [207 S.E.2d 152 (W. Va. 1974)] is very similar to that which is indicated if we should choose to follow the so-called 'modern' rule that a release of the original tort-feasor may not *necessarily* bar a further recovery against a successive and independent tort-feasor who negligently or unskillfully renders hospital or medical care in the treatment of the injury caused by the original tort-feasor. Presently, some fourteen jurisdictions have adopted a modification of the traditional rule which provides that:

"'A release by an injured party of the tort-feasor responsible for the original injury does not *per se*, in the absence of language indicative of such an intention on the part of the parties, preclude a second action by the injured party against a physician or hospital for negligent treatment or medical care of the original injury, if there has been less than full compensation recovered for the injured party's total injuries.' "In substance, this rule has been adopted in the following jurisdictions: Cimino v. Alway, 18 Ariz. App. 271, 501 P.2d 447 (1972); Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944); Knight v. Lowery, 228 Ga. 452, 185 S.E.2d 915 (1971); Smith v. Conn, 163 N.W.2d 407, 39 A.L.R.3d 251 (Iowa 1968); Fieser v. St. Francis Hospital and School of Nursing, Inc., 212 Kan. 35, 510 P.2d 145 (1973); Selby v. Kuhns, 345 Mass. 600, 188 N.E.2d 861 (1963); Couillard v. Charles T. Miller Hospital, Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); Hansen v. Collett, 79 Nev. 159, 380 P.2d 301 (1963); Wheat v. Carter, 79 N.H. 150, 106 A. 602 (1919); Daily v. Somberg, 28 N.J. 372, 146 A.2d 676, 69

A.L.R.2d 1024 (1958); Derby v. Prewitt, 12 N.Y.2d 100, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962); Galloway v. Lawrence, 263 N.C. 433, 139 S.E.2d 761 (1965); McMillen v. Klingensmith, 467 S.W.2d 193 (Tex. 1971); DeNike v. Mowery, 69 Wash.2d 357, 418 P.2d 1010 (1966).

"In jurisdictions following the modern rule, execution of the release in favor of the original tort-feasor does not furnish an irrebuttable presumption that the injured party also contemplated that he had recovered a complete satisfaction for his injuries, including those suffered at the hands of a negligent physician or hospital treating his original injuries. To the contrary, in the 'modern' rule jurisdictions, parol evidence is admissible to explain the intention of the parties at the time the release of the original tort-feasor was executed. Dickow v. Cookinham, 123 Cal. App. 2d 81, 266 P.2d 63 (1954); Knight v. Lowery, *supra;* Community School District v. Gordon N. Peterson, Inc., 176 N.W.2d 169 (Iowa 1970); Couillard v. Charles T. Miller Hospital, Inc., *supra*; Krenz v. Medical Protective Company, etc., 57 Wis.2d 387, 204 N.W.2d 663 (1973) . . . . [W]e are led to the conclusion that there is an aspect of inherent unfairness in the ineluctable application of an irrebuttable presumption which holds that a release of an original tort-feasor executed after treatment of injuries operates as an absolute bar to a second action by the injured party against a physician or hospital for negligent treatment or care of the original injury. Such a rule may operate unjustly for the benefit of negligent parties who have caused great injury to a person by unskillful medical treatment or negligent hospital care in that it absolutely frees them from liability or obligation to contribute to the recovery which the law has characterized as total. Such a rule does not provide for the contingency of latent and unpredictable manifestations of known injuries which may result in a greater and more permanent harm in the future, in a manner entirely unanticipated

when the original tort-feasor was released. And, although the law would have it otherwise, the rule that the release constitutes an absolute bar may, in fact, prove to be a trap for the unwary layman who is ignorant of the law. To particularize, is it reasonable and fair to conclude that an injured party also excuses his physician or hospital from negligence when he releases a motorist who struck his motorcycle on the highway and injured him? The question answers itself. Legal fiction should serve justice, not strangle it."

In *Wecker v. Kilmer*, 260 Ind. 198, 202-03, 294 N.E.2d 132, 134-35 (1973), the court, in discussing the traditional rule, stated:

"This allegedly prevailing view is also illogical because the alleged original tortfeasor has *disclaimed any liability* in the release. If one were injured in an accident where no one was at fault and one's injuries were subsequently aggravated by the negligent acts of a physician, one would not be without a cause of action against the physician. We have no proof that the *alleged* original tortfeasor was in fact a tortfeasor. It should only be to avoid unjust enrichment and prevent double recovery that any monies received from other sources would be credited against a recovery from the negligent physician.

"We note that this so-called prevailing view has received intensive criticism from modern commentators.

"'Dean Wigmore has denounced the doctrine as a "surviving relic of the Cokian period of metaphysics" (17 Ill. L. Rev. 563), Dean Prosser has criticized it as "at best an antiquated survival of an arbitrary common law procedural concept" (Torts, p.244) and Mr. Justice Rutledge, speaking for the Court of Appeals for the District Of Columbia, observed that "The rule's results are incongruous. More often than otherwise they are unjust and unintended. Wrongdoers who do not make or share in making reparation

are discharged, while one willing to right the wrong and no more guilty bears the whole loss. * * * Many, not knowing this, accept less only to find later they have walked into a trap. The rule shortchanges the claimant or overcharges the person who settles, as the recurring volume and pattern of litigation show. Finally, it is anomalous in legal theory, giving tortfeasors an advantage wholly inconsistent with the nature of their liability."' *Derby v. Prewitt* (1962), 12 N.Y.2d 100, 104, 187 N.E.2d 556, 558.

"We also note that the 'prevailing view' has become continually less acceptable to courts over the past two decades. See Anno. 39 A.L.R.3d 260.

"Two factors should be controlling in determining the effect of an agreement purporting to operate as a release: (1) Whether the injured party has received full satisfaction; and (2) Whether the parties *intended* that the release be in full satisfaction of the injured party's claim, thus releasing all successive tortfeasors from liability. See *Harper & James, Torts* (1956), § 10.1, *Prosser on Torts* (4th ed. 1971) at 304. Both are questions of fact and normally to be determined by the jury. The actual form or title of the release is immaterial and parol evidence should be permitted to determine the intent of the parties."

In this regard, we also note that the modern rule has apparently been incorporated in the Restatement (Second) of Torts § 885 (1979). That section provides:

"(1) A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them.

"(2) A covenant not to sue one tortfeasor or not to proceed further against him does not discharge any other tortfeasor liable for the same harm.

"(3) A payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made,

whether or not the person making the payment is liable to the injured person and whether or not it is so agreed at the time of payment or the payment is made before or after judgment."

After considering the advantages and disadvantages of both of the rules discussed above, as well as the authorities and writings of legal experts with respect to same, this court has concluded that the "modern rule" is the better and more equitable rule, and we hereby adopt it for application in this state in the instant case and henceforth.

In their brief on appeal, the appellees cite *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 131 N.W. 612 (1911), in support of the proposition that if one of several joint tort-feasors makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint tort-feasors. Primarily, the appellees contend that if Scheideler is allowed to pursue his suit in negligence against them, he may be allowed a double recovery for the same injury. We do not agree with the appellees' contention for several reasons which distinguish the facts in *Fitzgerald* from those in the instant case.

First, many of the cases cited as authority for the modern rule deal with the situation where the defendant is charged with a subsequent or successive wrong which contributed to the damage for which the original tort-feasor was liable. The distinction made between joint tort-feasors and successive tort-feasors as it relates to the modern rule of release is well set out by the Iowa Supreme Court in *Smith v. Conn*, 163 N.W.2d 407 (Iowa 1968). In that case the court states at 410-11:

"The cases have generally recognized a distinction between the rule of unity of discharge by release as applied to joint or concurrent tort-feasors on the one hand and successive tort-feasors on the other. In New York Court of Appeals in Derby v. Prewitt, 12 N.Y.2d

100, 236 N.Y.S.2d 953, 958, 187 N.E.2d 556, 559, Fuld, J.: 'As to the first asserted basis for the rule, it is obvious that the taxicab driver and the doctor, having neither acted in concert nor contributed concurrently to the same wrong, are not joint tort-feasors. (See Matter of Parchefsky v. Kroll Bros., 267 N.Y. 410, 413-414, 196 N.E. 308, 310-311, 98 A.L.R. 1387.) Their wrongs were independent and successive, rather than joint, and this being so, the plaintiff had not one but two separate and distinct causes of action, one against the cab driver for the negligent operation of his vehicle and the other against the doctor for his alleged malpractice in treating the fracture which the plaintiff sustained in the automobile accident. It is true that the driver could have been held liable for the aggravation of the injury caused by the doctor's negligence but, as pointed out above, that liability is not the result of any concept of joint wrongs but is rather the product of the familiar rule that a wrongdoer is responsible for the reasonably foreseeable consequences of his tortious act, including the negligent conduct of others. Conversely, it would defy reason to hold the physician liable for injuries caused by the original wrongdoer which were not the consequences of his own carelessness, and no one suggests that a release of the doctor would completely discharge the original wrongdoer.

. . . .

"'Since, therefore, neither the joint tort-feasor doctrine nor the reasons underlying it are here applicable, we may not say, as a matter of law, that the release executed by the plaintiff bars the present action. In the light of our analysis, the question for resolution, and it is to be decided as an issue of fact upon a trial, is whether the plaintiff's settlement with the taxicab driver did actually constitute satisfaction of all damages caused by his wrong or was intended as such. If it did, or was so intended, no claim remained against the doctor. But, if it did not reflect full satisfaction, and

was not so regarded — and the burden of proving this essential fact rests upon the plaintiff — the release will not prevent recovery against the doctor.'"

We are also persuaded by the line of authority under the modern rule which holds that two essential questions of fact are raised in the instant case. These questions pertain to whether the release given to the original tort-feasor is intended to release subsequent tort-feasors, and whether the tort victim has been fully compensated for his injuries. Such questions are for the trier of fact to decide. *DeNike v. Mowery*, 69 Wash. 2d 357, 418 P.2d 1010 (1966); *Fieser v. St. Francis Hospital & School of Nursing, Inc.*, 212 Kan. 35, 510 P.2d 145 (1973); *Harris v. Grizzle*, 599 P.2d 580 (Wyo. 1979). We also note the case of *Couillard v. Charles T. Miller Hospital, Inc.*, 253 Minn. 418, 92 N.W.2d 96 (1958), in which the Supreme Court of Minnesota overruled two prior decisions based on the traditional rule. In *Couillard*, the court held that the general release constituted prima facie evidence that the plaintiff had received full compensation for his injuries; that the plaintiff had the burden of proof to establish the contrary; and that where the physician is neither a party nor mentioned in the release, an ambiguity exists as to whether he was intended to be released.

In the present case, neither of the appellees was named in the release executed by the appellant nor did they make payment toward satisfaction of any liability. Furthermore, appellant alleges that since he executed the release prior to his discharge by Dr. Lewallen, he has not received full satisfaction for his injuries. Since we determine that the release in this case does not have the conclusive effect upon the liability as attributed to it by the trial court, there exist material issues of fact which preclude summary judgment. These issues of fact include, at least, whether or not the appellant intended to release Dr. Elias and the hospital (in his affidavit filed in connection with the motion for summary

judgment and in his deposition admitted into evidence, Scheideler alleged he had not so intended), and also whether he had received full payment and satisfaction for all his damages.

We conclude the summary judgment entered in favor of the appellees must be reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

BOSLAUGH, J., dissents.

LOUISE T. HAMMOND, APPELLANT AND CROSS-APPELLEE, V. NEBRASKA NATURAL GAS COMPANY, ET AL., WALSH, WALENTINE & MILES, APPELLEE AND CROSS-APPELLANT.

309 N.W.2d 75

Filed August 7, 1981. No. 43408.

1. **Insurance: Loans.** An arrangement between an insurer and an insured, whereby the former loans to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement, and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest.
2. **Insurance: Actions: Costs.** Where the loan receipt under which the insurer advances money to an insured obligates the insurer to bear the expense of all legal proceedings pursued in prosecuting the claims of the insured which the insured has pledged to the insurance company, it is improper to charge the insured with any of the expenses of litigation.
3. **Insurance: Actions: Interest.** An insurer which recovers, on behalf of its insured in a negligence action brought against a third person, the amount which the insurer has paid the insured is entitled to the judgment interest awarded on that amount, even though the loan receipt under which the insurer advanced funds to the insured provides that the loan is without interest, as such interest is not paid directly or indirectly by the insured but is paid by the third party with whom the insured has ceased to have concern and privity.
4. **Attorneys' Liens.** To be entitled to an attorney's lien under Neb. Rev. Stat. § 7-108 (Reissue 1977), it is first necessary that an attorney-client relationship, either express or implied, exists.

5. **Subrogation: Attorney Fees.** Under the "common fund" doctrine, where the holder of subrogation rights does not come into the action, whether he refuses to do so or acquiesces the action brought by the plaintiff, but accepts the avails of the litigation, he is subjected to his proportionate share of the expenses thereof, including attorney fees. However, this rule is not applicable where the party sought to be charged has employed his or its own attorney and has actively participated in the litigation, and such counsel has not terminated, abandoned, or acquiesced in the representation of his client by other counsel.

Appeal from the District Court for Dodge County: FRANCIS J. KNEIFL, Judge. Affirmed as modified.

William G. Line and John F. Kerrigan of Kerrigan, Line & Martin for appellant.

Richard E. O'Toole and Thomas J. Walsh of Walsh, Walentine, Miles, Fullenkamp & O'Toole for appellees Cornhusker, New Hampshire Ins. Co., and Walsh, Walentine.

Ronald H. Stave and Thomas J. Shomaker of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellee St. Paul Fire.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

This action is the second appeal of the above-captioned case to this court. The general background of the litigation is set out in our opinion in *Hammond v. The Nebraska Nat. Gas Co.*, 204 Neb. 80, 281 N.W.2d 520 (1979), and will not be repeated here, except as is pertinent in part with the issues in this appeal.

It appears from the record that after the entry of the judgment in the original action, the law firm of Walsh, Walentine & Miles of Omaha, Nebraska, filed attorney liens pursuant to the provisions of Neb. Rev. Stat. § 7-108 (Reissue 1977) against the proceeds of the judgment recovered by Louise Hammond, the plaintiff in the original case, in the amount of $427,500 and, in addition, interest thereon. Thereafter, on August 21,

1979, Walsh, Walentine & Miles filed in the original action what they captioned "Motion for Determination of Validity and Amount of Attorneys' Liens and Distribution of Judgment as Interests Appear."

On the following day, August 22, 1979, the law firm filed an "application," asking the court for a determination of the respective amounts of the various interests in the judgment and for an allocation of attorney fees from the amount of the personal interest of Louise T. Hammond and the amounts of the subrogated interest of Fireman's Fund Insurance Company and St. Paul Fire & Marine Insurance Company, plus a proration of reasonable sums expended for discovery, trial, and appeal of the captioned suit. On August 27, 1979, the plaintiff filed what it titled "Response Of Plaintiff To Motion With Respect To Attorneys' Liens And Distribution Of Judgment, And Application Supplementary Thereto." In that response plaintiff denied that the Walsh law firm had been employed to represent her; prayed that all the claims of Walsh be dismissed, or, in the alternative, that out of the proceeds of the judgment in the hands of the court, the court authorize the payment of court costs to the parties who had paid those costs and who were entitled to reimbursement; prayed for the repayment to the Cornhusker Casualty Insurance Company, the New Hampshire Insurance Company, the Fireman's Fund Insurance Company, and the St. Paul Fire & Marine Insurance Company of monies paid to her after the entry of the judgment under the terms of their respective insurance policies in amounts totaling $307,400, which sums had been paid to her under loan receipts from each of said companies, about which more will be said later in this opinion; and also prayed that all the balance of the avails of the judgment, including interest accrued and accruing, be paid to her.

This matter came on for hearing before the District Court of Dodge County on September 13, 1979, for a determination of the respective amounts and various

interests in the judgment rendered; the allocation of attorney fees; the allocation of all postjudgment interest; the division of the amount of postjudgment interest owing Louise T. Hammond; and the right, if any, of Walsh, Walentine & Miles to an attorney fee from Louise T. Hammond, the Fireman's Fund Insurance Company, and the St. Paul Fire & Marine Insurance Company.

In its order entered on April 9, 1980, the District Court found as follows:

"That on or about January the 10th, 1976, the Plaintiff, Louise T. Hammond, was the owner in fee of the Pathfinder Hotel in Fremont, Nebraska. That on January 10th, 1976, there were four insurance policies in full force and effect by four different insurance companies as hereinbefore set forth.

"That on or about February 4th, 1976, the New Hampshire Insurance Company paid Mrs. Hammond the face amount of its policy in the sum of $125,000.00, taking a loan receipt from the Plaintiff. That on or about the 4th day of February, 1976, the Cornhusker Casualty Insurance Company paid the Plaintiff the sum of $125,000.00, taking a like loan receipt from the Plaintiff. That on or about March 30, 1976, the Fireman's Fund Insurance Co. paid the Plaintiff the sum of $50,000.00, procuring a loan receipt from the Plaintiff. That the St. Paul Fire & Marine Insurance Company paid the Plaintiff the sum of $7,400.00, taking a like loan receipt from the Plaintiff.

"That immediately subsequent to January 10th, 1976, and at all times material to this matter, the Cornhusker Insurance Company and the New Hampshire Insurance Company were represented by the law firm of Walsh, Walentine and Miles. That the Fireman's Fund Insurance Co. was represented by the Law firm of Niewald, Risjord & Waldeck and the St. Paul Fire & Marine Insurance Company was represented by the law offices of Emil F. Sodoro, P.C.; and that the Plaintiff

was represented by the law firm of Kerrigan and Line.

. . . .

"There was no attorney-client relationship at any time existing between the law firm of Walsh, Walentine, and Miles with the Plaintiff, Louise T. Hammond, the Fireman's Fund Insurance Co. or the St. Paul Fire and Marine Insurance Company. Those respective parties had, at all times material, retained and were represented by counsel of their choice.

"That the Plaintiff, Louise T. Hammond, by the insurance contract and execution of the loan receipts was contractually obligated to cooperate with the four insurance carriers and their retained counsel and the Plaintiff's counsel was also obligated to cooperate as per the provisions of the loan receipts.

"The law firm of Walsh, Walentine & Miles represented their companies['] interest totaling $250,000.00 of the total $307,400.00 insurance proceeds and in the main they proceeded to prepare and present the case, be the chief counsel in the trial court, and in the main handle the subsequent appeal to the Supreme Court. As to the Plaintiff, Louise T. Hammond, they acted by reason of a contractual right with the Plaintiff under her insurance policy and by mutual agreement between the attorneys for the other two insurance carriers.

"The record is bare of any indication of non-cooperation by any of the other parties before the Court and received into evidence are numerous affidavits of attorneys of record and other persons involved directly or indirectly in the preparation and trial of the lawsuit. Giving equal credence to all the affidavits, they are hopelessly impossible of resolve. The law firm of Walsh, Walentine, & Miles prosecuted their claim upon attorney liens against the various interests of the other parties and in support thereof advanced an equitable theory of Common Fund or Quantum Meruit.

"The Court, addressing itself to the matter of the attorney liens filed by the law firm of Walsh, Walentine, & Miles, finds that no valid liens exist. Section 7-108,

R.R.S. Neb., 1943, authorizes attorney liens and the basis for the same i.e. an attorney-client relationship must exist, either express or implied. No such relationship existed, either express or implied, in the above entitled cause and therefore, there is no basis to give rise to a statutory attorney lien as authorized by Section 7-108.

"The Court, addressing itself to the applicants' theory of Common Fund or Quantum Meruit, the law firm of Walsh, Walentine, & Miles performed pursuant to a contract of employment with their employers, the Cornhusker Casualty Insurance Company and the New Hampchire [sic] Insurance Company. Professionally, they were obligated to do so. The Plaintiff, Louise T. Hammond, was contractually obligated to cooperate and so her attorneys were also obligated for they stood in no different stead than the Plaintiff. As between the counsel for the other insurance carriers, since the firm of Walsh, Walentine, & Miles had by far the greatest financial interest in the outcome of the law suit; the evidence establishes it is customary in the trade for the firm with the greatest interest to be the lead counsel. In this case, the record is repleat [sic] that is the position the Walsh Firm not only chose, but insisted upon assuming. This case is simply not a Common Fund proposition and the facts clearly distinquish the case before the bar from United Service[s] Automobile Association v. Hills, 172 Neb. 128, and other Nebraska cases which are addressed to the Common Fund doctrine."

The District Court also determined that the costs of the original litigation, as exhibited by exhibit C, amounted to $23,513.19. This court awarded costs in the amount of $2,932.22, leaving a net cost remaining of $20,580.97. The District Court allocated costs of the litigation in the percentage the various interests bore to the whole as follows: Cornhusker Casualty, .2924; New Hampshire Insurance, .2924; Fireman's Fund Insurance, .1170; St. Paul Fire & Marine, .0173; and Louise T. Hammond, .2809. The court also allocated the

interest, both awarded and accrued, in the same percentages. The costs of the action were taxed to the Walsh law firm and subsequent motions for new trial filed by both the plaintiff and the applicant were subsequently overruled.

In her brief on appeal, the plaintiff assigns as error that the trial court erred in failing to award her all postjudgment interest, and in charging her with a share of the litigation expenses. The law firm of Walsh, Walentine & Miles has cross-appealed to this court, assigning as error the failure of the trial court to allocate an attorney fee from a common fund produced for the benefit of Louise T. Hammond, Fireman's Fund Insurance Company, and St. Paul Fire & Marine Insurance Company. The appellee law firm also alleges error on the part of the trial court in declaring the attorney liens invalid.

The loan receipts supplied by the New Hampshire Insurance Company and the Cornhusker Casualty Insurance Company for the advancement of the funds to the plaintiff are almost identical, and provide in pertinent part: "Received from the New Hampshire Insurance Company (hereinafter referred to as 'Company') the sum of One Hundred Twenty-Five Thousand and no/100- - -Dollars ($---125,000.00---) as a loan, *without interest*, repayable only in the event and to the extent of any net recovery the undersigned may make from any person, persons, corporation or corporations, or other parties, causing or liable for the loss or damage to the property described below, or from any insurance effected on such property, *and as security for such repayment the undersigned hereby pledges to the said 'Company' all his, its or their claim or claims against said person, persons, corporation or corporations or other parties*, or from any insurance carrier or carriers, and any recovery thereon, and hereby delivers to said 'Company' all documents necessary to show his, its or their interest in said property.

"The undersigned covenants that no settlement has

been made by the undersigned with any person, persons, corporation or corporations, or other parties against whom a claim may lie, and no release has been given to anyone responsible for such loss and that no such settlement will be made, nor release given without the written consent of the said Company; and *the undersigned covenants and agrees to cooperate fully with the said Company, to promptly present claim and, if necessary, to commence, enter into and prosecute suit against such person or persons,* corporation or corporations, or other parties, through whose negligence or other fault the aforesaid loss was caused, or who may otherwise be responsible therefor, with all due diligence, in his, its or their own name.

"In further consideration of said advance the undersigned hereby guarantee(s) that he, it or they are the owner(s) of said property and entitled to recover upon said claim for loss or damage thereto, and hereby appoint(s) the managers and/or agents of the said 'Company' and their successors severally, his, its or their agent(s) and attorney(s)-in-fact, with irrevocable power, to collect any such claim or claims, and to begin, prosecute, compromise or withdraw in his, its or their name, *but at the expense of the said 'Company,' any and all legal proceedings that the said 'Company' may deem necessary to enforce such claim or claims,* and to execute in the name of the undersigned, any documents that may be necessary to carry the same into effect for the purposes of this agreement.

"Any legal proceedings are to be under the exclusive direction and control of said 'Company.'" (Emphasis supplied.)

A loan receipt provided by Fireman's Fund Insurance Company was signed by the plaintiff on March 30, 1976. The loan agreement form provided by St. Paul Fire & Marine Insurance Company does not appear in the record, but apparently was similar in its terms. We note that the validity of loan receipt agreements between an insured party and his insurer has been approved by this

court. *Shiman Bros. & Co. v. Nebraska National Hotel Co.*, 143 Neb. 404, 9 N.W.2d 807 (1943); *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.*, 162 Neb. 47, 75 N.W.2d 366 (1956). In *Shiman Bros.*, this court stated: "An arrangement between an insurer and an insured, whereby the former loaned to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement and the loan thus made is not such a payment of insurance as to make the *insurer the real party in interest.*" (Emphasis supplied.) (Syllabus of the court.)

In the instant case, the plaintiff entered into loan agreements whereby she pledged any and all claims she had against Nebraska Natural Gas Company to her insurers as security for the repayment of the "loans" in accordance with the terms of the loan agreement, in the total amount of $307,400. The loan receipts expressly provided that the plaintiff would not enter into any settlement with anyone responsible for her loss; that she would cooperate fully with her insurers in prosecuting the claim; that all legal proceedings were to be under the exclusive direction and control of her insurers; and that said legal proceedings would be at the expense of the insurers.

In disposing of this case, it is obviously necessary to interpret the language contained in the loan agreements executed by the plaintiff. In *Wyatt v. Woodmen Acc. & Life Co.*, 194 Neb. 614, 616-18, 234 N.W.2d 217, 219-20 (1975), this court stated as follows: "A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. . . .

. . . .

"An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. The language should be considered not in accordance with what the insurer intended it to

mean but what a reasonable person in the position of the insured would have understood it to mean. In giving effect to this principle of law, it is imperative that the contract made by the parties shall be respected and that a new contract is not interpolated by construction." See, also, *Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co.*, 204 Neb. 156, 281 N.W.2d 539 (1979).

It appears to us that the language of the loan receipts is clear and unambiguous. By the terms of the loan receipts the insurers obligated themselves to bear the expense of all legal proceedings pursued in prosecuting the claims of the plaintiff, which she pledged to the insurance companies. We determine that the order of the District Court must be modified in part as to that portion of the order charging her with a percentage of the litigation expenses, as set out above in the order of the court.

We do not agree, however, with the plaintiff's contention that she is entitled to all postjudgment interest in the judgment recovered by her in the amount of $427,500, which amount is approximately $120,000 more than the amount loaned to her by the insurance companies. For clarification, we note that the insurance companies do not claim interest on the money they loaned to plaintiff in March of 1976 under the loan receipts; rather, the companies claim the right to postjudgment interest on the sum of $307,400 included in the original judgment.

While Nebraska apparently has not ever specifically passed upon this question, we are persuaded by the opinion of the court in *Herbert Rosenthal J. Corp. v. St. Paul F. & M. Ins. Co.*, 21 App. Div. 2d 160, 249 N.Y.S.2d 208 (1964), in which case the Supreme Court, Appellate Division, held that an insurer which recovered, on insured's behalf in a negligence action against a third person, the amount the insurer had paid the insured plus loss of profit was entitled to interest awarded on the amount paid to insured, even though the loan receipt stated that the loan was without interest,

where the receipt was the means of making absolute payment of the loss and of permitting the insurer to sue in insured's name. With respect to the question of who was entitled to the interest on the judgment, the court stated: "On this analysis there is no valid ground, other than a forced application of what are at best ambiguous words, why the insurer should not receive the interest accrued on the money of which it had been deprived, and not the insured which has had its money all this time. . . . This is not interest paid directly or indirectly by the insured ('the borrower') which is all that is forbidden by the loan receipt, but it is paid by the third party with which, as to this portion of the recovery, the insured has long ago ceased to have concern and privity." *Id.* at 166, 249 N.Y.S.2d at 214.

In the instant case, the plaintiff has had the benefit of the $307,400 since the date it was paid to her by the respective insurance companies in 1976. We determine that the trial court properly divided the interest, both awarded and accrued, in proportionate shares according to the percentage the parties' interest bears to the whole.

We now turn to the assignments of error raised by the law firm of Walsh, Walentine & Miles on cross-appeal. We determine, initially, that the trial court was correct in ruling that no proper attorney lien existed under § 7-108. That section specifically provides: "An attorney has a lien for a general balance of compensation upon any papers *of his client* which have come into his possession *in the course of his professional employment*; and upon money in his hands *belonging to his client*, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." (Emphasis supplied.)

At no time in the instant case did an attorney-client relationship exist between the law firm of Walsh, Walentine & Miles and the plaintiff, the Fireman's Fund Insurance Company, or the St. Paul Fire &

Marine Insurance Company. Those parties were, at all times pertinent to the litigation, represented by the counsel of their choice. Therefore, the attorney liens filed by the applicant under § 7-108 are invalid, and the trial court properly ruled as such.

We now consider what is probably the principal issue involved in the cross-appeal of Walsh, Walentine & Miles. The firm contends that the trial court erred in failing to allocate a fee to the Walsh firm from a "common fund" produced for the benefit of Louise T. Hammond, Fireman's Fund Insurance Company, and St. Paul Fire & Marine Insurance Company. Walsh contends that he is entitled to such fee because of the fact that he and his firm did most of the work, trial and preparatory, with reference to the original litigation, as a result of which a judgment was recovered greatly in excess of that which was actually anticipated, and which enured to the benefit of both the plaintiff and the insurance companies covering losses resulting from the fire. It is true that the Walsh firm, by virtue of the size of its claim, acted as "lead counsel" in the litigation, and also represented its own clients, New Hampshire Insurance Company and Cornhusker Casualty Insurance Company. Walsh describes the contributions of counsel for the other insurance companies and parties to the litigation as being minimal or nonexistent. However, the record reveals that he assumed his position as "lead counsel" at his insistence; and it is not true, as revealed by the record, that the other counsel made minimal or no contributions. In fact, it appears that part of the reason for the failure of the other counsel to partake more actively in the preparation and trial of the lawsuit was due to Walsh's request and insistence. At the hearing with regard to attorney fees, John Risjord, counsel for Fireman's Fund Insurance Company, testified, and was examined by a member of his own firm. His testimony is enlightening, and we set it out in some detail:

"Q- Did you, in any of your telephone conversations

with Mr. Walsh, have occasion to discuss with him how attorney fees would be paid if settlement or judgment were obtained against any of the Defendants? A- Yes, sir. Q- Do you know when that conversation took place? A- Yes, sir. Q- When was that? A- March 9, 1976. Q- And how are you so sure of that date, sir? A- I have a telephone record of it. As a matter of fact, I have our original telephone office record here. Q- Those records reveal that you talked with the number which corresponds with the telephone number of the Walsh Firm in Omaha on March 9, 1976? A- Correct. I had previously taked [sic] with him on the telephone on the subject of the March 9th, conversation and Mr. Kerrigan had written a letter a little earlier, a few days earlier anyway, suggesting a proration of the recovery. Which Mr. Walsh was not very happy with because the net effect of it might be to diminish Mr. Walsh's fees. I advised Mr. Walsh early in the game that I didn't know how much gas explosion experience he had, and I still don't know, and I advised him that I had tried 12 or 14 of these cases, including plastice [sic] pipe and coupling cases, to whatever benefit that could be to him. That I would be glad to help out and try to guide the litigation and he thanked me for that and indicated that he was perfectly capable of handling it himself. I'm sure he was. So, we didn't undertake to further advise him much as to how to handle the case. He advised me, in a letter I think, that he would also send me copies of letters to Kerrigan and rather insisted upon taking the lead in the case. He felt he had his client's lion share of the money involved in the case, to some extent a quarter of a million dollars on the building and we only had $50,000.00 on the contents. Q- What previoulsy [sic] was the nature of the conversation on March 19th, with relation to attorney fees? A- Mr. Walsh expressed concern that the filing of the suit was emminent [sic]. He had not yet paid the Hammonds' apparently, but he had the check ready to pay them. We had paid the Hammonds' their total policy. He prepared a preliminary

petition and sent me a copy of it for critique. I critiqued it and suggested some things that he might change and alter in it, including the fact he didn't have the coupler manufacturer properly identified or pleaded and I found out who that was from Mr. White and furnished the name and this sort of thing. Following that he redrafted it and sent it to me and we discussed it before it was filed and discussed it with Mr. Kerrigan. That was one of the things I called about and he raised the issue of attorney fees. In view of Mr. Kerrigan's letter, in which it was at least implied, that Mr. Walsh or I might not enjoy the attorney fee arrangement we had with our clients, *it was Mr. Walsh's suggestion, in fact he insisted, that each of us should look to our own clients for our fees.* He was particularly adamant about that and Mr. Kerrigan was not going to share his fee. I agreed that would be agreeable with me. He advised me in that conversation that he had discussed it with Mr. Kerrigan and he thought Mr. Kerrigan would go along with that. So, we entered into the three way situation somewhat awkwardly, but on the basis each of the three firms would undertake to collect whatever fee arrangement they had with their own clients and no attorney involved would share in anybody elses' [sic] fee. Q- Did Mr. Walsh express to you concern that the ultimate judgment which might be obtained might be less than the total insurance on the building? A- Yes. Q- Did he indicate that was his concern about it that the fees than a whole pie a whole pie there to be divided up? A- That's correct. He was particularly concerned about that with respect to the value of the building. The building had been purchased for substantially less than a quarter of million. However, I felt the liability of the gas company being evidence that the jury would undoubtedly award whatever, substantially whatever, value was proved on the building. I didn't have the concern he did. I wasn't representing the building carrier and I felt we had a pretty solid contents cliam [sic] for the furnishings and equipment for $50,000.00. Q- After the review of the

petition, and the amendments made pursuant to your suggests [sic] and the case was filed, did you, thereafter, offer the services of Mr. White and the services of your law firm to Mr. Walsh to pursue this litigation? A- On a number of occasions. Q- What response, if any, did you get to these offers? A- Well, he made it clear it was his parade and I truly didn't want to rain on it either. It is traditional in insurance subrogation where you have two companies on the same risk that the one that has the lion's share, that company and their lawyer run the show. I was perfectly willing that be so. As we went along, there was very little discovery for a number of months. The parties were filing motions and the gas company was filing motions and parties being added and subtracted and primarily consolidated for discovery with other cases and this sort of thing. Both Mr. Kerrigan and Mr. Walsh were primarily on top of it. Q- Did your firm take part in the actual trial which commenced in January of 1978? A- Well, yes and no. We got news, I think through Mr. Kerrigan, that the Walsh Firm was trying to get one of their smaller cases they were involved in to trial as a test case. I was concerned about that because I didn't think the case they chose had too much impact. It was property damage and subrogation without much appeal. I felt one of the stronger cases might be better litigated. I hadn't been consulted in the matter so I volunteered to Mr. Walsh's Firm. I first talked to Mr. O'Toole and told him we would be of whatever assistance we could be in that case. Q- Was that the Opera Company case? . . . Q- Have you reviewed the time record of the firm to determine the total number of days or percentage actual trial days which our firm was represented here in the courthouse? A- Not percentage wise. I know that you attended the trial on reportedly at least all but, I think, on parts of one or two days. I was rather distressed when you reported to me after you arrived here that Mr. Walsh had had you excluded from the counsel table in view of the fact we were representing an inter-

est in the subrogation in the action with a substantial financial interest. Q- In your years of practice, have you ever seen that type of procedure invoked before? A- Never." (Emphasis supplied.)

The record also reveals that the other firms involved in said litigation contributed in varying amounts and degrees to the preparation and trial of the lawsuit. The attorneys for the plaintiff herein, Kerrigan and Line, were, as revealed by the record, responsible in no small part for obtaining the evidence with reference to the damages involved in the fire of the Pathfinder Hotel and were able to do so after the Walsh firm was unable to obtain evidence justifying an increase in the verdict, redounding to the benefit of the plaintiff. Also the Sodoro firm, attorneys for St. Paul Fire & Marine Insurance Company, attended 29 depositions in preparation for the trial. We also point out that while there is not in evidence records of the time spent by the other firms for their own clients in connection with the case, as was true in the case of the Walsh firm, we believe that the value of the respective contributions of counsel in a multicounsel case cannot be determined solely on the basis of the time devoted to the case. The skill, advice, and experience of other counsel who may assist or advise, and participate to some degree, in recovering a favorable verdict in a complex suit must also be considered. We believe it would be an almost impossible task for this court to review, evaluate, and apportion the contributions of the respective counsel in situations such as this and attempt to award to the various counsel participating in a lawsuit part of the fees individually contracted for by them with their own clients. Had there been a specific agreement between said counsel at the inception of the litigation, and their respective contributions and duties delineated, it probably would have diminished or eliminated the possibility of situations occurring such as the one with which we are confronted. We might also add that if any or all of the other interested counsel were not carrying out their appointed

tasks during the course of the litigation, complaint to that effect could and should have been made before judgment was obtained, and not after the recovery of judgment in an effort to augment the attorney fees for counsel under the claim that it had made the greatest contribution to the success of the litigation.

In support of its position that it is entitled to part of the fee of other counsel in the litigation, the Walsh firm relies strongly upon two prior Nebraska cases, to wit, *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961), and *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969), which cases establish the "common fund" rule in this jurisdiction. In *United Services Automobile Assn. v. Hills, supra*, the court stated at 133, 109 N.W.2d at 177: "The applicable rule is that where the holder of the subrogation right does not come into the action, whether he refuses to do so or acquiesces in the plaintiff's action, but accepts the avails of the litigation, he should be subjected to his proportionate share of the expenses thereof, including attorney's fees." In the *Hills* case, the attorney was awarded an attorney fee from a recovery made as the result of his efforts, where the insurance company, although originally a party to the action, withdrew from the suit and refused to participate in the recovery. The court, under those circumstances, refused to permit the unjust enrichment of the insurance carrier and awarded Hills an attorney fee for representing the interest of United Services Automobile Association in recovering the "common fund." In the opinion the court states at 134, 109 N.W.2d at 178:

"United contends, however, that the foregoing rule does not apply where the insured is informed that its subrogation claim is not to be included in the litigation and it indicates an intention to pursue the enforcement of its right of subrogation in some other manner. It seems clear to us, however, that whatever intentions United may have had prior to the commencement of the present action, they were abandoned when it elected

to pursue its general equitable right of subrogation against the avails of the settlement established by the efforts of the Dawsons and Hills. In other words, when United abandoned its previous hostile position and elected to seek the collection of its claim from the avails of the litigation and settlement secured solely by the efforts of the Dawsons and Hills, it brought itself squarely within the cited authorities. Under such situation, justice and equity require that United pay its proportionate share of the expenses, including attorney's fees, incurred by the Dawsons and Hills in establishing the fund from which United seeks to benefit."

We believe that the *Hills* case is factually distinguishable from the instant case in several respects. In *Hills*, the insurance company was not a party to the litigation nor was it represented by counsel. In the instant case the plaintiff and the four insurance companies, two not being represented by the Walsh firm, were actual parties to the litigation and were each represented by attorneys employed by them. While it is true, as discussed above, that the amounts of the respective contributions of the attorneys varied greatly, the fact remains that they were still representing their clients in the litigation and participated, to some extent at least, in the conduct of the case. We are impressed by the language of the court in *Wash. Fire & Marine Ins. Co. v. Hammett*, 237 Ark. 954, 377 S.W.2d 811 (1964), where the court stated at 956, 377 S.W.2d at 813: "The appellant's real grievance lies in having to pay a fee to an attorney not of its own choice. Subrogation however, is governed by equitable principles. *Webster v. Horton*, 188 Ark. 610, 67 S.W.2d 200. *If the appellant had employed its own attorney and had actively participated in the action against Purcell it could not fairly have been compelled to contribute to Howard's fee. Pontiac Mutual County, Etc. Co. v. Sheibley, 279 Ill. 118, 116 N.E. 644. But when the insurance company has benefited from the work done by the insured's attorney there is no inequity in*

requiring it to bear its fair share of the collection expense." (Emphasis supplied.)

Likewise, in *Travelers Ins. Co. v. Williams*, 541 S.W.2d 587, 589-90 (Tenn. 1976), the court was confronted with a similar situation and stated: "There are, of course, many situations in which the work of an attorney proves useful to persons other than his own client. The normal rule in such cases is that he must look only to his client, with whom he has contracted, for his compensation, notwithstanding the acceptance of benefits by others. [Citations omitted.] But, an exception to this rule is made whenever one person, having assumed the risks and expense of litigation, has succeeded in securing, augmenting, or preserving property or a fund of money in which other people are entitled to share in common. In that event, the expenses of the action are borne by each participant according to his interest. [Citations omitted.] The fairest and most efficient means of distributing these costs is thought to be to make them a charge upon the fund itself. This device, known as the 'fund doctrine,' was invented by courts of equity to prevent passive beneficiaries of the fund from being unjustly enriched. It is, therefore, never applied against persons who have employed counsel on their own account to represent their interests. [Citations omitted.] Thus, the right to employ counsel of one's own choosing is preserved." In its opinion the court also stated: "Neither do we find evidence of unjust enrichment of the insurer from the services of the insured's attorney upon which a quasi or constructive contractual duty could be based. In our view, one is not unjustly enriched by a benefit 'forced upon' him as the result of services voluntarily and officiously performed by another who has been expressly informed by the alleged promisor that his services are not desired.

"We conclude that the facts of this case do not entitle the insured's attorney to receive any fee from the insurer with respect to the subrogation claim; he acted as

a volunteer." *Id.* at 590-91. In this connection see, also, *Pontiac Fire Ins. Co. v. Sheibley*, 279 Ill. 118, 116 N.E. 644 (1917).

The Walsh firm also cites and relies upon the cases of *Gillotte v. Omaha Public Power Dist.*, 189 Neb. 444, 203 N.W.2d 163 (1973), and *Schulz v. General Wholesale Coop. Co., Inc.*, 195 Neb. 410, 238 N.W.2d 463 (1976), in support of its contention that it is entitled to share in the attorney fees of the other attorneys in the cause because of work performed. We point out, however, that both of the above-cited cases were workmen's compensation cases and involved an interpretation of Neb. Rev. Stat. § 48-118 (Reissue 1978), which specifically provides that where an employer and employee join in a suit against a third person, the District Court has jurisdiction to determine all disputes between the employer and employee, including the setting and allocation of attorney fees and expenses. There is no similar specific provision applicable to the facts of the situation involved in this case. Moreover, we point out that even in *Schulz, supra*, the court went on to state at 416-17, 238 N.W.2d at 467-68: "At no time did St. Paul's counsel terminate or abandon its representation or rely on or acquiesce in representation of their client by Cobb. Their representation of St. Paul remained active and viable throughout, culminating in their participation in the District Court hearing to approve the final lump sum settlement.

"Under these circumstances, we conclude that St. Paul had full and adequate representation from its own counsel and we affirm the District Court's denial of plaintiff's application for attorney's fees."

Our conclusion is that the "common fund" doctrine is not applicable under the facts of the instant case, and that the Walsh firm is not entitled to augment its contracted fees entered into with its clients, but that the respective counsel in the instant case, with respect to attorney fees for their participation in the litigation, are relegated to their contracts with their respective clients.

In view of what we have stated above, the order entered by the District Court, as modified, must be and hereby is affirmed.

AFFIRMED AS MODIFIED.

EUGENE STOCK, APPELLANT, V. LOUIS A. MEISSNER AND WESTERN SURETY COMPANY, A CORPORATION, APPELLEES.

309 N.W.2d 86

Filed August 7, 1981. No. 43412.

1. **Limitations of Actions.** The statute of limitations begins to run when a cause of action accrues.
2. **Contracts: Limitations of Actions.** By failing to make demand, a party to a contract to whom payment is due on demand cannot do away with the statute of limitations.
3. **Bonds: Principal and Surety.** A bond does not cover defaults of the principal occurring prior to the effective date of the bond, unless the bond expressly provides otherwise, for it cannot be assumed that the surety intended to be bound by the past delinquencies of the principal.
4. **Summary Judgment.** Where there are no genuine issues as to any material fact and a party is entitled to judgment as a matter of law, summary judgment may be properly granted.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

R. Steven Geshell of Robak & Geshell for appellant.

Patrick A. Brock for appellees.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and WOLF and BURKHARD, District Judges.

BURKHARD, District Judge.

This is an action by the seller of grain against a grain dealer and his bonding company for damages for the alleged failure of the grain dealer to pay the fair market value for grain delivered to the dealer.

From February 13 through February 20, 1974, the

plaintiff-appellant, Eugene Stock (hereinafter called Stock), and his assignors delivered to defendant-appellee Louis A. Meissner (hereinafter called Meissner), a licensed grain dealer buyer, 4,072.32 bushels of corn pursuant to an oral contract. The grain was to be paid for by Meissner on demand. During the period February 13 to 20, 1974, Meissner was bonded by Universal Surety Company (hereinafter called Universal), which bond was canceled on September 21, 1975. Meissner then became bonded by defendant-appellee Western Surety Company (hereinafter called Western), effective September 18, 1975.

On December 28, 1978, Stock made his first demand on Meissner for the payment of the corn delivered in February of 1974. Meissner stated that Stock had not only been paid, but he was overpaid, because not all of the corn delivered was of the quality contracted for. Stock then filed suit against Meissner and Western on February 12, 1979, for $8,144.64, plus interest, attorney fees, and court costs. The defendants, by their answers, alleged the affirmative defenses of the statute of limitations and the statute of frauds. Western further alleged in its answer that it was not a surety on Meissner's transactions at the time of the deliveries involved herein, i.e., February of 1974.

Defendants filed a motion for summary judgment. The trial court, on March 24, 1980, sustained the motion as to Meissner on the ground that the claim of Stock was barred by the 4-year statute of limitations on oral contracts, Neb. Rev. Stat § 25-206 (Reissue 1979), and sustained the motion as to Western on the ground that it was not the surety for Meissner at the time of the transactions in February of 1974. On April 18, 1980, Stock's motion for a new trial was overruled, and this appeal was then taken. We affirm the ruling of the trial court.

Stock sets forth several assignments of error, but the basic contention is that the court erred in finding that there were no genuine issues of material fact and in

finding that the defendants were entitled to a judgment of dismissal as a matter of law.

The issue as regards Meissner is when Stock's cause of action against Meissner accrued so as to start the running of the 4-year statute of limitations.

In *Luikart v. Hoganson*, 135 Neb. 280, 281 N.W. 27 (1938), action was commenced on December 26, 1936, on a promissory note dated May 26, 1931, which note was payable "on demand after date." Hoganson, the maker, permitted judgment by default to be entered against him. The endorsers demurred to plaintiff's petition on the ground that as to them the action was barred by the 5-year statute of limitations. The demurrer was sustained, and plaintiff appealed to this court. Plaintiff argued that the statute of limitations did not begin to run from the date of the original note but only from the date of actual demand, since payment was to be made "on demand after date." This court, in ruling that the demurrer was properly sustained and that the statute of limitations had run, stated that plaintiff-payee could have brought an action on the demand note the day after it was executed and delivered, but the action was brought more than 5 years thereafter. The cause of action thus accrued on May 27, 1931. The court stated as follows: "It is well settled law here and elsewhere that the statute of limitations begins to run when a cause of action accrues. . . . By failing to make a demand, payee in a note payable on demand cannot do away with the statute of limitations." *Id.* at 283, 281 N.W. at 28. See, also, *Melville Lumber Co. v. Scott*, 135 Neb. 379, 281 N.W. 803 (1938); *Grant v. Williams*, 158 Neb. 107, 62 N.W.2d 532 (1954); *Alexanderson v. Wessmann*, 158 Neb. 614, 64 N.W.2d 306 (1954); 54 C.J.S. *Limitations of Actions* § 201 (1948).

It is clear from this court's prior holdings that Stock's cause of action accrued on February 21, 1974, the day demand *could* have been made. Suit was not filed by Stock until February 12, 1979, and thus his claim against Meissner is outlawed by the applicable 4-year

statute of limitations. The trial court was correct in sustaining Meissner's motion for summary judgment against Stock.

The issue as regards Western is whether or not it could be liable for Meissner's alleged nonpayment for the grain delivered in February 1974, when the effective date of its bond is September 18, 1975. Stock contends that there is such liability and that the statute of limitations as regards Western is 10 years under Neb. Rev. Stat. § 25-209 (Reissue 1979). The pertinent part of Western's bond is as follows: "'NOW THEREFORE, this obligation is such that if . . . the said Principal(s) [Meissner] . . . his agents and employees will pay the purchase price of such grain *upon demand of the owner or seller* . . . then this obligation to be void, otherwise, to remain in full force and effect.'" (Emphasis supplied.)

Stock argues that the bond was breached, and the cause of action against Western accrued, when he made demand on Meissner for payment on December 28, 1978, and Meissner allegedly failed to make payment.

It is true that Western was the bonding company on December 28, 1978. However, it is only logical and practical to construe the language "upon demand of the owner or seller" in the bond to mean when the owner or seller had the *right* to make demand for payment. This *right*, as we have stated, accrued on February 21, 1974, when Stock's cause of action against Meissner accrued. It is not logical that the cause of action against Meissner would accrue on February 21, 1974, but not against his bonding company until December 28, 1978. Under Stock's theory, assuming the 10-year statute of limitations would be applicable, Stock would have until December 28, 1988, to file suit against Western on transactions that occurred almost 15 years before.

"A bond does not cover defaults of the principal occurring prior to the effective date of the bond, unless the bond expressly provides otherwise . . . for it cannot be assumed that the surety intended to be bound by the

past delinquencies of the principal." *Department of Agriculture v. Ackerman*, 34 Ill. App. 3d 796, 797, 341 N.E.2d 48, 49-50 (1975), *rehearing denied* January 2, 1976. See, also, 74 Am. Jur. 2d *Suretyship* § 29 (1974).

We therefore conclude that Western is not liable for any nonpayment by Meissner arising out of the grain transactions in February 1974, and the trial court acted correctly in sustaining Western's motion for summary judgment against Stock.

Where, as in this case, there are no genuine issues as to any material fact and defendants are entitled to judgment as a matter of law, summary judgment may be properly granted. Neb. Rev. Stat § 25-1332 (Reissue 1979).

Appellant Stock's assignments of error are without merit. The judgment of the trial court is affirmed.

AFFIRMED.

CLINTON, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH H. NOWICKI, APPELLANT.

309 N.W.2d 89

Filed August 7, 1981. No. 43764.

1. **Investigative Stops.** Police officers may stop any person in a public place whom they reasonably suspect of committing, who has committed, or who is about to commit a crime, and may demand of that person his name, address, and an explanation of his actions.
2. ____ Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.
3. **Arrests: Probable Cause.** The test of probable cause for a warrantless arrest is whether, at the moment, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy in-

formation were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

4. ____: ____. Probable cause is to be evaluated by the collective information of the police engaged in a common investigation.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

BRODKEY, J.

Joseph H. Nowicki, the defendant and appellant herein, was charged in the District Court of Douglas County, Nebraska, with possessing a controlled substance, to wit, cocaine, with the intent to distribute, deliver, or dispense in violation of Neb. Rev. Stat. § 28-416 (Reissue 1979). The case was tried before the court on July 22, 1980, and the defendant was convicted of the lesser-included offense of possession of a controlled substance as charged. Nowicki was subsequently sentenced to a term of probation for a period of 2 years, the first 60 days to be spent in the custody of the Douglas County Department of Corrections. He has now appealed to this court, and his sole assignment of error is that the District Court erred in overruling his motion to suppress the cocaine seized as being the fruit of an unlawful arrest. We affirm.

The record on appeal discloses that on May 23, 1980, at approximately 4 p.m., Officer Thomas Gorgen of the Omaha Police Department was informed that one William Yoder had been arrested, and a quantity of suspected cocaine had been seized pursuant to a search warrant issued to Officer Jack Caniglia. At the time of the arrest, Yoder was driving a vehicle owned by

Hezekiah Pittman, who was suspected of distributing controlled substances in Omaha.

In an effort to locate Pittman, the police obtained information which led them to believe that Pittman was staying at the address of 13164 Grover Plaza in Omaha, and that he possibly had in his possession a quantity of cocaine. A search warrant for the address was obtained by Officer Caniglia, which was served upon the lessee of the premises, one Barney L. Boyd. Boyd informed the police that Pittman had spent the previous night at the apartment with another individual known to Boyd only as "Bill." Boyd told the police that Pittman had remained at the apartment until 3 p.m. that afternoon, when Pittman received a telephone call from an anonymous caller informing him that "Bill" had been arrested. The physical description given by Boyd of the person known as "Bill" was similar to the description of William "Bill" Yoder who had been arrested driving Pittman's car. Boyd stated to the police that Pittman had requested a ride to the area of 24th and L Streets in Omaha, and that Pittman was carrying a brown cardboard box when he left the Boyd vehicle.

Upon their return to the Central Police Station, Officers Caniglia and Gorgen were advised by their supervisor, Lt. Robert Olson, that further information as to the whereabouts of Pittman had been obtained from two informants who had provided reliable information in the past. The first informant stated that Pittman was involved in drug activities with Joseph H. Nowicki, who resided at 2312½ L Street with a Caucasian female named Denise Sedan, and that Nowicki was distributing cocaine from that address. The informant also stated that Nowicki was supplied with his cocaine by a black male known as Hezekiah Pittman and that it was probable that Pittman would go to the Nowicki residence if he needed a place to "hide out."

The second informant stated to the police that he had observed Pittman in possession of a quantity of suspected cocaine within the previous 72 hours and that in

all likelihood Pittman would go to the residence of Nowicki to "hide out." In addition, the second informant stated that Pittman owned a blue, two-door Dodge automobile that was parked in that vicinity, in which Pittman might hide suspected cocaine.

Based upon the information stated above, officers were assigned to prepare an affidavit and application for issuance of a search warrant for the apartment at 2312½ L Street, and also for the persons of Hezekiah Pittman, Joseph H. Nowicki, Denise Sedan, and their automobiles. Officers Caniglia and Gorgen were assigned to commence surveillance of the defendant's apartment to determine if Hezekiah Pittman was at that location. It appears that the police were directed to remain in position until the search warrant was completed and brought to the residence. During the surveillance, officers conducting the surveillance observed a blue 1967 Dodge two-door van parked in the Payless Shoe Store parking lot at 24th and L Streets. A check of the vehicle's license indicated that the van was registered to Hezekiah Pittman. Also parked in the lot was a red pickup truck which Officer Caniglia was advised belonged to the defendant, Joseph Nowicki.

At approximately 9:30 p.m. that evening, a Caucasian male and female left the apartment and entered the blue van. The automobile was driven to the front of the building, at which time a black male left the building and entered the vehicle. At this time, Officers Caniglia and Gorgen were directed to follow the parties, and they began to follow the red pickup truck owned by the defendant. While the officers were following the truck, they were advised by Lt. Olson over their radio that they should stop and detain the driver of the truck if they thought he spotted them following the vehicle. The truck proceeded 3 blocks north on 24th Street where it turned into a McDonald's restaurant.

Suspecting that the driver had spotted them, the officers stopped the vehicle in question and had the driver pull it to the side of 24th Street. At this time the

officers obtained the driver's license and registration of the driver of the truck, which identified him as Joseph Nowicki. The defendant was told that the police were conducting an investigation, and Nowicki returned to the driver's seat of his truck. After Nowicki returned to his vehicle, the officers were directed by Lt. Olson by radio to have the party transported to Central Police Station. As the defendant was leaving his truck at the request of the police, Officer Caniglia observed a plastic bag, with a white substance enclosed, protruding from the driver's seat. It appears that there was a tear or slit in the seat, and Officer Caniglia testified that he could observe the plastic bag from where he was standing outside the truck. Officer Caniglia took the plastic bag into his possession. The contents were later identified as cocaine, and the defendant was subsequently arrested for possession of a controlled substance. It appears that while the police were detaining Nowicki prior to his arrest, Officer Gorgen returned to the surveillance area and obtained a police cruiser, which was used to transfer the defendant back to his residence at 2312½ L Street. The warrant for the search of defendant's residence, vehicle, and person arrived approximately 45 minutes later. The police subsequently found on the person of the defendant a small piece of folded magazine paper containing a white substance which was later identified as cocaine.

In his brief on appeal the defendant assigns as error that the District Court erred in failing to sustain defendant's motion to suppress the cocaine seized as being the "fruit" of an unlawful arrest. Defendant's primary contention is that the police did not have probable cause to arrest him as there was no evidence that the vehicle was violating any traffic regulations, or that the defendant was engaged in any other criminal activities. It would appear from the record that the defendant is challenging the investigative stop of his vehicle, rather than the subsequent search of his person.

By virtue of the authority contained in Neb. Rev.

Stat. § 29-829 (Reissue 1979), police officers may stop any person in a public place whom they reasonably suspect of committing, who has committed, or who is about to commit a crime, and may demand of that person his name, address, and an explanation of his actions. In the recent case of *State v. Ebberson, ante* p. 41, 305 N.W.2d 904 (1981), this court considered the standards required for making an investigative stop in connection with the recent opinion of the U.S. Supreme Court in *United States v. Cortez*, __U.S.__, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). In *Ebberson*, we stated at 44-45, 305 N.W.2d at 907:

"The U.S. Supreme Court has addressed the standards that must be met in an investigatory stop to satisfy the requirements of the fourth amendment in *United States v. Cortez*, __U.S.__, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). The Court held that an investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account.

"Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, *as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.* See, *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed 2d 660 (1979)." (Emphasis supplied.)

This court has held that a police officer is authorized to arrest a person without a warrant if he has reasonable cause to believe that such person has committed a crime. In *State v. Jones*, 208 Neb. 641, 645, 305 N.W.2d 355, 358 (1981), we stated: "'[T]he test of probable cause

for a warrantless arrest is whether at the moment the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.'" In this regard, we have also held that probable cause is to be evaluated by the collective information of the police engaged in a common investigation. *State v. Stickelman*, 207 Neb. 429, 299 N.W.2d 520 (1980).

In assessing the totality of the circumstances presented by the facts in the instant case, we determine that probable cause existed for the police to arrest the defendant on the evening of May 23, 1980. The police were informed that the defendant resided at 2312½ L Street and that Pittman would probably be at this address. They were also provided a description of the Pittman vehicle and advised that cocaine was sometimes kept in the car. This information was all verified by the police in their surveillance of the Nowicki address, and the fact that William Yoder was arrested while driving a vehicle owned by Pittman, which was found to have a controlled substance hidden inside. The information strongly indicated that Pittman and his acquaintances possessed and dealt in drugs, and the information obtained by the police provided probable cause to believe that the defendant was committing and had committed a crime prior to his arrest.

We also note that once the police had detained the defendant, their observation of the bag of cocaine inside his vehicle was proper, as the bag was in the plain view of the police when the door was opened. See, *State v. Brown*, 195 Neb. 321, 237 N.W.2d 861 (1976); *State v. Sotelo*, 197 Neb. 334, 248 N.W.2d 767 (1977). The evidence was properly seized and received into evidence at trial. Defendant's sole assignment of error is without merit.

The judgment of the District Court must be affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent from the majority in this case. While I would generally concur with the principles of law set out by the majority, I believe the facts in this case do not justify the application of those rules. The record discloses that as the officers followed the truck, it pulled into a McDonald's parking lot and the driver ordered food. There was nothing suspicious about the driver or his driving other than it was believed that these individuals had, on other occasions, been involved in drug dealing at 2312½ L Street. There was no evidence that the occupants were at the moment engaged in any illegal activity.

While the defendant was waiting for his food, the officers were advised by Lt. Olson that if the officers thought the driver "had spotted their tail" they should stop him, as a search warrant was being prepared for the residence at 2312½ L Street. The officers then blocked the vehicle's path and stopped it as it was leaving the McDonald's parking lot. The officers advised the occupants that they were conducting an investigation and asked for the defendant's driver's license and registration. The defendant complied with the request. The officers then ran a vehicle check on the registration and were advised by Lt. Olson to arrest the party and transport him to Central Police Station. No reason for the arrest was given. At that point in time the officers had no evidence that any crime had been committed, was being committed, or was about to be committed. All they knew was that the individuals or some of them had been involved in drug dealing and the home at 2312½ L Street was to be searched pursuant to a search warrant, which was then being obtained. It was not until *after* they had arrested the defendant pursuant to instructions by Lt. Olson that they sought to secure the vehicle and for the first time observed the plastic bag protruding from a slit in the seat.

Officer Caniglia, one of the arresting officers, testified that he was ordered to arrest the defendant, take

him to police headquarters, and tow his vehicle before any weapon or cocaine was found. The arrest was in fact then accomplished and the defendant handcuffed before anything was found in the truck.

While the need to combat crime is ever present, we must not disregard the clear mandates of the Constitution. This case now stands for the proposition that if one has a prior criminal record and is known to deal in illegal activity, he or she may be arrested and their persons or properties searched without warrant on the basis of their prior association with crime. Such a conclusion totally annihilates the protections sought to be provided citizens by the fourth amendment to the Constitution of the United States and Neb. Const. art. I, § 7. There is simply no evidence in this record to indicate that prior to the arrest being made anyone associated with law enforcement believed that there were drugs present in the vehicle, or that at the time of the defendant's arrest he was then actually engaged in a drug transaction. Probable cause has been defined as existing if the facts and circumstances known to the officer warrant a prudent and reasonable man in believing that in the case of an arrest the arrestee has committed the offense. See, *Henry v. United States*, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959); *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963). Mere good faith on the part of arresting officers cannot justify a warrantless arrest. I believe that the motion to suppress should have been sustained.

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. TWEEDY, APPELLANT.

309 N.W.2d 94

Filed August 7, 1981. No. 43876.

1. **Pleas.** Although the preferred procedure for ascertaining whether or not a factual basis exists to support a guilty plea is to inquire directly of the defendant, an examination before sentencing of a presentence report containing such facts is an acceptable alternative.
2. **Sentences: Plea Bargains.** A defendant has no legal basis to rely on a sentence recommended as part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement.
3. **Pleas.** A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily.
4. **Pleas: Misdemeanors: Constitutional Rights: Waiver.** A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded.

Robert G. Krafka of Krafka & Sixta, P.C., for appellant.

Paul L. Douglas, Attorney General, and Lynne Fritz for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, Retired District Judge.

HASTINGS, J.

The defendant, Richard L. Tweedy, has appealed from the District Court for Dodge County which affirmed a county court conviction of Tweedy for second offense driving while under the influence of alcoholic liquor. Defendant received a sentence of 90 days in the Dodge County jail and suspension of his driver's license for 1 year. The defendant as-

signs as error the court's refusal to allow the defendant to withdraw his plea because the court had not established a voluntary and intelligent waiver of his constitutional rights when the court accepted defendant's guilty plea; the failure to find a factual basis for the plea; and the failure to follow the sentencing recommendations of the prosecuting attorney. We reverse.

The defendant had initially been charged on August 1, 1979, with third offense driving while under the influence of alcohol. Pursuant to a plea bargain, on September 27, 1979, the complaint was amended to second offense driving while under the influence of alcohol, and the defendant pleaded guilty to the amended charge. The Dodge County attorney's office recommended a 2-year probation to include a $200 fine, loss of driving privileges during probation except for work and probationary purposes, and antibuse and inpatient treatment if deemed necessary by the Dodge County Chemical Abuse Program staff. The court pointed out to the defendant that such recommendation was only that of the county attorney's office and that the court was not obligated to "follow any plea agreement." After hearing from the defendant that he was pleading guilty because he did in fact commit the crime, the county court accepted the plea and ordered the defendant to report to the chief probation officer for a presentence investigation and to the Dodge County Chemical Abuse Program office for evaluation and testing. A presentence report was furnished to the court on October 25, 1979, which contained overwhelming evidence in the section containing the police report to support a finding of driving while intoxicated, including a gas chromatograph test of twenty-hundredths of one percent.

The matter came on for sentencing on December 3, 1979. On that date the court continued the matter until January 3, 1980, and deferred sentencing pending the defendant's successful completion of inpatient treatment at an approved treatment facility of his

choice. The matter again came on for sentencing on May 15, 1980. By that time, the court had learned that the defendant had been terminated from the treatment program because of two unexcused absences. The court ordered the defendant to serve 90 days in the Dodge County jail, and a 1-year suspension of his driver's license. The sentence and conviction were appealed to the District Court for Dodge County and there affirmed.

Defendant's second and third assignments of error may be disposed of rather quickly. The preferred procedure for ascertaining whether or not a factual basis exists to support a guilty plea is to inquire directly of the defendant. However, an examination of a presentence report containing such facts made before sentencing is an acceptable alternative. *State v. Daniels* 190 Neb. 602, 211 N.W.2d 127 (1973); *State v. Leger*, 190 Neb. 352, 208 N.W.2d 276 (1973). We have also suggested that by a defendant admitting that he is in fact guilty of the crime charged, he has furnished a factual basis for accepting the plea. *State v. Hyslop*, 189 Neb. 331, 202 N.W.2d 595 (1972).

There are two answers to the defendant's contention that the trial court failed to follow the recommendations of the county attorney. A defendant has no legal basis to rely on a sentence recommended as part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement. *State v. Ristau*, 201 Neb. 784, 272 N.W.2d 274 (1978). Furthermore, the court made it abundantly clear to the defendant that before it would consider probation for the defendant it would be necessary for him to complete a program of inpatient treatment for alcohol. He failed to do so.

There is no merit to either of these two assignments of error.

A more difficult problem is presented by defendant's claim that there was no voluntary and intelligent waiver of his constitutional rights prior to the accept-

ance of his guilty plea. In other words, we are faced with the general question of the applicability of the principles of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), to misdemeanors. *Boykin* identified the three main constitutional rights waived when a plea of guilty is accepted, i.e., the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers. "We cannot presume a waiver of these three important federal rights from a silent record." *Boykin* at 243.

This court has been reluctant to embrace unequivocally the specific holdings of *Boykin*. "This requirement of an item-by-item review of constitutional rights on a guilty plea is a strained and a too extreme construction of those cases." *State v. Turner*, 186 Neb. 424, 425, 183 N.W.2d 763, 765 (1971). However, we did adopt the holding of *Boykin* in principle. "What Boykin says is that the court cannot presume a waiver of federal constitutional rights from a silent record. That case requires that a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily." *Turner* at 425, 183 N.W.2d at 765. If we concede that the record must affirmatively show an intelligent plea, understandingly entered, it is difficult to imagine how this can be demonstrated unless that same record discloses knowledge on the part of a defendant as to what rights he is waiving when entering such plea.

In any event, does the *Boykin-Turner* rule apply to misdemeanor proceedings? The courts of several of our sister states have encountered the same problem. In an exhaustive opinion by Tobriner, J., the California Supreme Court in *Mills v. Municipal Court*, 10 Cal. 3d 288, 515 P.2d 273, 110 Cal. Rptr. 329 (1973), held that *Boykin* was applicable to all misdemeanors regardless of penalty. "A misdemeanor defendant no less than a felony defendant relinquishes various constitutional rights by entering a plea of guilty. There is no question,

of course, that in misdemeanor proceedings a defendant retains fully both his right to confront his accusers and his privilege against self-incrimination [citations omitted]; moreover, in this state, every misdemeanor defendant has a right to a trial by jury." *Mills* at 298, 515 P.2d at 280, 110 Cal. Rptr. at 336. "The People have suggested no logical basis for confining the rulings of *Boykin* and *Tahl* to the felony context in which they were enunciated, and we can discern no rational ground for such a distinction." *Id.* at 299, 515 P.2d at 281, 110 Cal. Rptr. at 337. "Under these circumstances, we believe that it would be more expedient simply to provide for an adequate record of a defendant's waivers in all felony and misdemeanor cases, rather than to require the trial court first to make a pre-arraignment determination of the potential sentence a misdemeanor defendant might receive, and then to obtain explicit waivers from those who face imprisonment." *Id.* at 301, 515 P.2d at 282, 110 Cal. Rptr. at 338.

In *Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 278 N.E.2d 374 (1972), the Supreme Court of Ohio reached a similar conclusion. "The Supreme Court, however, did not limit its decisions to felonies nor did it include or exclude misdemeanors. The court only made flat assertions that these rights and privileges applied to criminal cases.

"Academically, and based on sound legal reasoning, these same rules should apply to misdemeanors as well as felonies. Valid reasons have not been presented why the Supreme Court rules regarding waivers of constitutional rights should not apply to misdemeanors as well as to felonies. The labels of 'misdemeanor' and 'felony' should not control whether a defendant is entitled to all of his constitutional rights." *Cleveland* at 84, 278 N.E.2d at 378.

The Michigan Court of Appeals in *People v. Tomlinson*, 50 Mich. App. 655, 213 N.W.2d 803 (1973), apparently following general court rules promulgated

by the Supreme Court, refused to apply the requirements of *Boykin* to "simple misdemeanors," i.e., those where the penalty is less than 6 months' imprisonment. Its reason for such decision was that "less solicitude is required than reciting the litany of constitutional rights which the defendant is waiving" in a case involving a 10-day jail sentence and a $50 fine. *Tomlinson* at 659, 213 N.W.2d at 805.

Although holding that the record did show that defendant was made aware of the constitutional rights which would be waived by a guilty plea, the court in *Crew v. Nelson*, 88 S.D. 162, 216 N.W.2d 565 (1974), held that *Boykin* was applicable to misdemeanor cases. "We first conclude that the Boykin standards of arraignment apply generally to misdemeanor cases. A misdemeanor defendant has the same rights to trial, to confronting his accusers, and to his privilege against self-incrimination. Thus we see no rational basis for making a distinction between a felony and a misdemeanor case." *Crew* at 164-65, 216 N.W.2d at 566.

We do recognize, however, that there is a vast difference between the impact of a waiver of constitutional rights when one's liberty is involved as opposed to his pocketbook. In *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), the Court held that no person may be imprisoned for any offense absent a knowing and intelligent waiver of counsel. In arriving at that decision, the Court reviewed the authorities providing for specified standards required under the sixth amendment for all criminal prosecutions. These included the requirement of a public trial, the right to be informed of the nature and cause of the accusation, the right of confrontation, and compulsory process for obtaining the attendance of witnesses. "We have never limited these rights to felonies or to lesser but serious offenses." *Argersinger* at 28.

We therefore hold that no defendant may be imprisoned for any offense, whether a traffic infraction, misdemeanor, or felony, absent a knowing and intelli-

gent waiver of his rights as provided for by the *Boykin-Turner* rule. That means that such defendants are entitled to be informed of the nature of the charges against them, the right to assistance of counsel, the right to confront witnesses against them, the right to a jury trial where otherwise authorized, and the privilege against self-incrimination. A voluntary and intelligent waiver of these rights must affirmatively appear from the record.

We realize that this holding may place some additional burdens on some of the municipal and county courts which have not heretofore followed this procedure. Therefore, the rule announced today is to be applied prospectively only, i.e., to guilty pleas taken after the date of the issuance of the mandate in this case.

It remains only for us to apply these principles to the instant case. The defendant was represented by counsel at all stages of the proceedings. (We should mention, however, that counsel was not the same as the one representing the defendant on this appeal.) The defendant was advised that the charges against him had been reduced from third offense to second offense driving while intoxicated. The defendant declared that no threats or promises had been made to him. He was advised that the recommendations of the county attorney as to probation were not binding on the court. The trial court then stated "[t]hat the Court isn't obligated to follow any plea agreement. Do you understand what your rights are in this Court?" to which the defendant replied "Uh—yes"; following which the trial court stated, "Do you have any question about any of those rights at this time that you wish to have explained?" and the defendant said "No." He was told of the possible penalties. The defendant was then asked by the court if he entered "this plea of guilty voluntarily, knowingly, intelligently and with understanding of the consequences of your plea," and he replied "Yes."

It is readily apparent that the *record* fails to disclose

that defendant knew of his right to a jury trial, of the right to confront witnesses against him, or of the privilege against self-incrimination. It is therefore impossible to conclude from a record entirely barren of any facts demonstrating that defendant understood his various rights that the defendant voluntarily and intelligently gave them up by pleading guilty. The case is reversed, defendant's conviction is vacated, and the cause is remanded to the District Court for further proceedings.

Before concluding, however, we cannot urge strongly enough that *all* courts should devise and implement a standard procedure for explaining the various rights to defendants entering pleas of guilty. If this is done, there should be no reason in the future for a court to fail to properly advise defendants of their constitutional rights when offering pleas of guilty. However, we should hasten to add that defense counsel are not immune from their share of criticism in cases of this kind. The fact that we employ the adversary system in the administration of justice does not mean that defense counsel have no responsibility to the court. It is incumbent upon counsel to take the necessary precautions to ensure that the record made adequately demonstrates for the benefit of the court that the defendant has knowledge of his rights and freely and voluntarily waives them before allowing him to plead guilty.

REVERSED AND REMANDED.

COLWELL, Retired District Judge, dissenting.

I must respectfully dissent from the opinion of the majority of the court in this case which reverses the judgment entered by the District Court of Dodge County affirming defendant's conviction in the county court for second offense driving while under the influence of alcoholic liquor and vacating such conviction, which conviction was based upon defendant's plea of guilty to said charge. In his appeal to this court, the

defendant *inter alia* assigns as error the refusal of the court to allow the defendant to withdraw his plea of guilty, contending that there was no voluntary and intelligent waiver of his constitutional rights at the time the court accepted his guilty plea.

The majority of the court in today's action again relies on the case of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), which case in its opinion pointed out three constitutional rights which are waived upon the acceptance of a guilty plea, to wit, (1) the privilege against self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. The Court in that opinion stated at 239: "*So far as the record shows, the [trial] judge asked no questions of [defendant] concerning his plea, and [defendant] did not address the court.*" (Emphasis supplied.) The Court further stated at 243: "We cannot presume a waiver of these three important federal rights from a silent record."

In today's opinion, the majority states: "We therefore hold that no defendant may be imprisoned for any offense, whether a traffic infraction, misdemeanor, or felony, absent a knowing and intelligent waiver of his rights as provided for by the *Boykin-Turner* rule." The *Turner* referred to in the above quotation refers to the case of *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), which sets forth the rule for accepting pleas of guilty that has been in effect in this state for over 10 years, and which has been consistently followed by other Nebraska decisions since that time. That rule states that a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. In *Turner*, and subsequent cases, the same argument was made, relying specifically upon *Boykin v. Alabama*, *supra*, that *Boykin* requires an affirmative showing in the record that the trial court advised the defendant of his privilege against compulsory self-incrimination

as well as his right to confront his accusers before a determination of his waiver of these constitutional guarantees. In *Turner*, this court stated at 425, 183 N.W.2d at 765: "We do not interpret Boykin so strictly. What Boykin says is that the court cannot presume a waiver of federal constitutional rights from a silent record. That case requires that a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily."

As pointed out by the majority in its opinion, the defendant was represented by counsel at all stages of the proceedings; he was advised that the charges against him had been reduced from third offense to second offense driving while intoxicated; he declared that no threats or promises had been made to him; and he was advised that the recommendations of the county attorney as to probation were not binding on the court. The trial court then inquired of the defendant if he understood "what your rights are in this Court," to which the defendant replied "Uh—yes"; following which the trial court asked if he had "any question about any of those rights at this time that you wish to have explained," to which the defendant responded "No." He was told of the possible penalties for the offense. The court then asked him if he entered his plea of guilty "voluntarily, knowingly, intelligently and with understanding of the consequences of your plea," and he replied "Yes." The court then proceeds to point out in the majority opinion that the record does not disclose that the defendant knew of his right to a jury trial, or of his right to confront witnesses against him, or of the privilege against self-incrimination, and therefore that defendant's plea of guilty to the charge was not a voluntary and intelligent plea. The meaning and extent of the court's language in *Boykin v. Alabama, supra*, have been the subject of discussion and rulings by the courts of

innumerable jurisdictions in this country since the case was decided in 1969, and the majority of the cases decided since that time which have considered the question have held that the express enumeration of the three rights referred to and the express waiver of the accused prior to the acceptance of the guilty plea are not a matter of constitutional due process. The following cases are enlightening as to the status of the rule announced in the *Boykin* case since it was released.

In *Wilkins v. Erickson*, 505 F.2d 761 (9th Cir. 1974), the court discussed the issue in some detail, stating at 763:

"Boykin Does Not Require
Articulation of the Three Rights

"Wilkins relies upon Boykin v. Alabama, *supra*. He contends that since he was not personally advised by the trial judge on entry of his plea that by pleading guilty he was waiving (1) his privilege against self-incrimination, (2) his right to trial by jury, and (3) his right to confront his accusers; that he was unaware of the consequences, and that his plea, therefore, was not voluntarily and intelligently made. Wilkins further argues that the failure of the trial judge to articulate these three rights on the record resulted in a 'silent' record which cannot be supplemented by a post-conviction evidentiary hearing. Accordingly, he wants the opportunity to replead.

"Wilkins relies on the following language from *Boykin:*

'We cannot presume a waiver of these three important federal rights from a silent record.

'What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what a plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought.'

395 U.S. at 243-244, 89 S. Ct. at 1712. [Footnote reference omitted]

"The district court's decision, however, is supported by Supreme Court decisions subsequent to *Boykin* and several circuits. The rigid interpretation of *Boykin* urged by Wilkins has not been adopted by the Supreme Court in subsequent decisions on voluntariness of guilty pleas. In Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), the Court citing *Boykin*, upheld a guilty plea as voluntary and intelligent even though defendant had not been specifically advised of the three rights discussed in *Boykin*. The *Brady* Court clarified *Boykin* by stating, '[t]he new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.' 397 U.S. at 747-748 fn. 4, 90 S. Ct. at 1468. In North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970), the Court stated that in determining the validity of guilty pleas the 'standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' Specific articulation of the *Boykin* rights is not the sine qua non of a valid guilty plea.

"Other circuits have considered the application of *Boykin* to state prisoner petitions and have held in accordance with Brady v. United States, *supra*. McChesney v. Henderson, 482 F.2d 1101, 1106 (5 Cir. 1973) (The court alternately held that a subsequent state evidentiary hearing could be considered); Wade v. Coiner, 468 F.2d 1059, 1060 (4 Cir. 1972). *Cf.* Todd v. Lockhart, 490 F.2d 626, 627 (8 Cir. 1974) (A subsequent state evidentiary hearing failed to decide the question of voluntariness. On appeal from denial of a writ of habeas corpus by the district court, its judgment was reversed).

"The Ninth Circuit has apparently not passed on the

question. Accordingly, we hold that *Boykin* does not require specific articulation of the above mentioned three rights in a state proceeding. Brady v. United States, 397 U.S. at 747-748, 90 S. Ct. 1463 and cases *supra.*"

Likewise, in *Wood v. Morris*, 87 Wash. 2d 501, 554 P.2d 1032 (1976), the court discussed *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), at great length, and concluded by stating at 507-08, 554 P.2d at 1036-37:

"[W]hile it has been held that a defendant's constitutional rights to a jury trial, confrontation and protection against self-incrimination must be specifically and expressly enumerated by the trial judge and expressly waived by the accused prior to acceptance of a guilty plea, *see In re Tahl, supra* at 131-33 [1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969)]; *Higby v. Sheriff of Clark County, supra* at 781 [86 Nev. 774, 476 P.2d 959 (1970)], we adopt an interpretation of *Boykin* which does not impose this requirement as a matter of constitutional due process. This is the view of the majority of courts which have considered the question. *See, e.g., McChesney v. Henderson, supra* at 1106-10; *United States v. Sherman, supra* at 305; *Stinson v. Turner*, 473 F.2d 913, 915-16 (10th Cir. 1973); *Wade v. Coiner, supra* at 1061; *State v. Turner*, 186 Neb. 424, 425, 183 N.W.2d 763 (1971); *People v. Kuchulan*, 390 Mich. 701, 704, 213 N.W.2d 95 (1973); *Commonwealth v. Morrow*, 363 Mass. 601, 296 N.E.2d 468, 472-73 (1973); *Merrill v. State*, 87 S.D. 285, 290, 206 N.W.2d 828 (1973). Supreme Court decisions subsequent to *Boykin* make this clear. In *Brady v. United States*, 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970), and *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970), the court, citing *Boykin*, upheld guilty pleas without any indication that specification of the three constitutional rights enumerated in *Boykin* was required to be made at the time of the acceptance of the pleas. We also note

that in both cases the court relied upon evidence received at post-conviction hearings. We hold, therefore, that there is no constitutional requirement that there be express articulation and waiver of the three rights referred to in *Boykin* by the defendant at the time of acceptance of his guilty plea if it appears from the record, and the clear and convincing weight of extrinsic evidence if the record is unclear on the matter, that the accused's plea was intelligently and voluntarily made, with knowledge of its consequences."

It should be noted that the court includes among the cases in support of its finding that the requirement of *Boykin* is not a matter of constitutional due process the Nebraska case of *State v. Turner*, *supra*. Nebraska has followed the rule set down in *Turner* in at least a dozen cases since *Turner* was decided, including the following cases: *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974); *State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978); *State v. Curnyn*, 202 Neb. 135, 274 N.W.2d 157 (1979); *State v. Hill*, 204 Neb. 743, 285 N.W.2d 229 (1979); *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980). I believe it is clear in the instant case that defendant's guilty plea to the charge against him was voluntarily and intelligently entered, notwithstanding the apparent failure of the court to inquire with reference to the three matters set out in *Boykin*. In addition to the verbatim record as set forth in the record, there were other records, facts, and circumstances before the court at that time, including (1) the affidavit for arrest warrant by the arresting officer describing the defendant's erratic driving and the results of his breath test which showed the alcohol content in his blood at the time to be twenty-hundredths of one percent; (2) the journal entry of the arraignment stating that the defendant was advised of the nature of the charge, which was for driving while intoxicated (DWI), third offense; (3) the journal entry of his conviction on September 27, 1979, which recited in part: "[T]he Defendant advised

the Court that he understood his rights, waived his right to jury . . . ." Also, "It was determined that the plea was entered voluntarily, knowingly, and intelligently and with the understanding of the consequences of the plea"; (4) the defendant was represented by retained counsel; and (5) the defendant was familiar with the nature of the proceedings, having twice previously been convicted of DWI. After the plea bargained guilty plea, the sentence was not imposed until almost 8 months had lapsed, during which time the defendant was attempting alcohol rehabilitation. I believe that the facts in this case clearly indicate that the defendant's guilty plea fully complied with the standards set out in *State v. Turner*, 186 Neb. 424, 427, 183 N.W.2d 763, 766 (1971), that: "'The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant'"; and, as further stated in *Turner* at 425, 183 N.W.2d at 765: "This requirement of an item-by-item review of constitutional rights on a guilty plea is a strained and a too extreme construction of those cases." The majority opinion states the rule that the defendant is entitled to be informed of certain enumerated rights, including those that are a basis for his appeal, is to apply only *if imprisonment is imposed.* Such a rule would automatically narrow the holding of *Turner* and our subsequent cases to require an item-by-item dialogue, which is contrary to our established law.

Further, I disagree with the holding of the majority that the *Boykin-Turner* waiver rule applies to all misdemeanors and requires that a voluntary and intelligent waiver of those rights must affirmatively appear from the record. The courts are divided as to whether the *Boykin* rule applies to misdemeanors. In support of its conclusion that it does, the majority opinion cites as its principal authority the case of *Mills v. Municipal Court*, 10 Cal. 3d 288, 515 P.2d 273, 110 Cal. Rptr. 329 (1973), where the court held that

Boykin was applicable to all misdemeanors. However, in that same opinion the court pointed out at 303, 515 P.2d at 284, 110 Cal. Rptr. at 340: "[I]n evaluating the procedures utilized in inferior courts for advising defendants of their rights and obtaining 'on the record' waivers, the realities of the typical municipal and justice court environment cannot be ignored, and that, *so long as the spirit of the constitutional principles are respected*, 'the convenience of the parties and the court should be given considerable weight.'" (Emphasis supplied.) On the contrary, the court in *People v. Tomlinson*, 50 Mich. App. 655, 213 N.W.2d 803 (1973), held that the *Boykin* rule did not apply to simple misdemeanors where the penalty is less than 6 months' imprisonment. The problem of applying the strict requirements set out in *Boykin* to minor criminal matters was early recognized by the advisory committee of the American Bar Association in preparing their tentative draft of "Standards Relating to Pleas of Guilty" in 1967. In their introduction to those standards, it is stated as follows: "The Advisory Committee proposes these standards for application to all serious criminal cases. More simplified procedures, not dealt with in this report, could properly be used for minor traffic offenses and other lesser offenses, such as those typically proceeded against in court without counsel for the prosecution. The category of cases not covered by these standards may well vary from state to state, and will depend upon such matters as the allocation of jurisdiction between courts, the availability of facilities, and the understanding of the general public of the penalties for certain crimes."

It should be remembered that in Nebraska county and municipal courts have jurisdiction of misdemeanor offenses and traffic offenses, and daily handle a very large volume of such cases, generally under adverse circumstances and with limited supportive personnel. It is not unusual for some of those courts to handle in excess of 50 criminal cases during the course

of a single court day. During the calendar year 1980, the county courts in Nebraska processed approximately 190,000 traffic cases and 50,000 misdemeanor and ordinance cases; and during the same period, the municipal courts processed 118,000 traffic, ordinance, and misdemeanor cases. These courts are courts of record and generally utilize tape recording equipment to record the proceedings in such courts. As a general rule, the tapes are destroyed in approximately 60 days. The verbatim records of cases similar to that involved in this appeal are usually brief and are often supplemented by the judges' handwritten notes, findings, and orders, necessitated by the large volume of cases handled and the urgency to make a record of the case and then to proceed with the next case. The majority, in its opinion, recognizes these problems and the necessity of coordinating them with the public's interest in prompt, efficient administration of the judicial system. To require the same degree of care and exactitude in the processing of such cases as is required for the arraignments of defendants charged with felonies and more serious offenses can only result in impeding the efficiency of the judicial system. All that should be required in such cases is that the rule as announced in *State v. Turner*, that the plea of the defendant be voluntary and understandingly made, should suffice. To require a reversal of a conviction based upon a guilty plea made by the defendant because an item-by-item interrogation is not conducted by the trial judge would, in my opinion, be unnecessarily burdensome and would have a crippling effect upon those engaged in enforcing the laws of this state, and upon the judicial system itself. This, I believe, is totally unnecessary and should not be done. In the few and rare instances where injustice is done under the existing system, there is ample opportunity for relief by a defendant through post conviction procedures, as is done in other states, or by further dialogue between the court and the defendant to es-

tablish the existence of other required elements for a guilty plea which were previously not inquired into at the original arraignment. Guilty pleas should not be routinely set aside where it is clear that such pleas were voluntarily, understandingly, and intelligently made, as I believe was clearly true in this case.

For all the reasons stated above, I must respectfully dissent from the opinion of the majority of the court in this case.

I am authorized to state that BRODKEY, J., joins in this dissent.

BOSLAUGH, J., joins in this dissent.

KIRSCH FABRIC CORP., A CORPORATION, APPELLEE, V. BROOKSTEIN ENTERPRISES, INC., A CORPORATION, DOING BUSINESS AS UPHOLSTERY UNLIMITED, APPELLANT.

309 N.W.2d 328

Filed August 14, 1981. No. 43331.

1. **Deceptive Trade Practices.** Comparative advertising which is untrue, misleading, or deceptive is unlawful.
2. **Deceptive Trade Practices: Injunction.** Deceptive trade practices and unfair competition may be enjoined under Nebraska law.
3. **Judgments.** A judgment which is unduly broad and makes prospective findings is erroneous.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed in part, and in part reversed.

Irving B. Epstein of Viren, Epstein, Leahy & Coren and Miller & Rowen for appellant.

Thomas E. Johnson and Jonathan R. Breuning of Baird, Holm, McEachen, Pedersen, Hamann & Haggart for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and MARTIN, District Judge.

MARTIN, District Judge.

This is an appeal from a decree of the District Court of Douglas County, Nebraska, enjoining the defendant-appellant from specific advertising practices, i.e., using plaintiff-appellee's name and sample books in appellant's radio and television ads.

The facts are as follows. Appellee Kirsch is in the business of selling upholstery fabrics wholesale. Appellant Brookstein Enterprises is in the business of selling upholstery fabrics retail. Both Kirsch and Brookstein sell a striped velvet upholstery fabric manufactured by Baxter, Kelly & Faust, Inc., referred to as "Miami" pattern. Appellant, in February 1978, engaged in radio and television advertising campaigns making comparisons between the appellee's and appellant's goods. The ad objected to is as follows: "This book of Kirsch upholstery samples is used by a number of our competitors. You order from it and wait. Upholstery Unlimited carries a number of similar fabrics on hand. This striped velvet from the book has a suggested retail of $18.60. Our everyday low price is only $6.99 on a similar fabric. On the average chair that's a savings of $70, and on the average sofa that's a savings of $150. Compare for yourself our large on-hand selection at Upholstery Unlimited in the Woolco Center on South 84th Street."

The issues involved here are: (1) Was appellant's advertising misleading, deceptive, or untrue? (2) Does appellant have to "palm off" its goods as the same as another to fall within the purview of the Nebraska Uniform Deceptive Trade Practices Act? (3) Was the injunction too broad?

The contention that those ordering upholstery material from Kirsch had to wait for delivery, the purported savings on upholstering chairs and sofas if material was purchased from appellant, and the use of Kirsch's sample book for comparisons was determined by the district judge to be either misleading or deceptive, and from our review of the evidence de novo, we agree.

Perhaps the main point of contention concerned the following: "Upholstery Unlimited carries a number of similar fabrics on hand. This striped velvet from the book has a suggested retail of $18.60. Our everyday low price is only $6.99 on a similar fabric."

Both Kirsch and Brookstein purchased the "Miami" pattern from the same supplier. Testimony at the trial indicated that in the manufacture of upholstery fabrics "first quality" is fabric with less than seven defects per 35 yards or one per 5 yards, not to exceed seven. Testimony of an employee of the manufacturer supplying both appellee and appellant was to the effect that appellee Kirsch only bought first quality goods, while appellant Brookstein purchased seconds.

Appellant contends that by judicious cutting, etc., second quality goods could be made "similar" to appellee's first quality goods.

The dispute revolves around the definition of "similar." Appellant argues its "Miami" pattern is nearly corresponding or resembles appellee's "Miami" pattern in many respects, even though originally it was second quality goods; that this is not deceptive since it is not "palming off" goods as identical.

Is the word "similar" used in its ordinary sense or is it used in its more restrictive sense, as the appellee contends, so that the consumer is misled and believes he is buying "identical" material at a cheaper price? That is, is appellant "palming off" its goods as being the same as another's?

We believe that the purchaser of upholstery goods would not be deceived regarding the term "similar" as used in this ad; that there is no likelihood of confusion here. The ordinary consumer would know that he is buying something almost the same but not identical when using the ordinary meaning of the word "similar." The price differential is such that no prudent individual would believe he was getting the same goods.

However, if we view the advertising package as a whole, taking into account the misrepresentation as to

having to wait for material ordered, the unauthorized use of Kirsch's sample book, and unsubstantiated comparison as to savings per unit upholstered, there was deception under the common law of unfair competition and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §§ 87-301 et seq. (Reissue 1976).

The lower court, therefore, rightly enjoined appellant from the dissemination of false and misleading advertising, except it went too far in specifically enjoining appellant from ever disseminating advertising which utilized appellee Kirsch's name or trade name. In effect, the court enjoined the appellant from prospective acts for which injunction is unfounded and which would be a deprivation of due process.

Judgment of the trial court is reversed with respect to the order enjoining appellant from ever using appellee's name in its advertising. In all other respects it is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

McCOWN, J., concurs in result.

HARVEY R. WOOLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF TY MARTIN WOOLEY, APPELLANT, V. JANET KITTLE, APPELLEE.

309 N.W.2d 805

Filed August 21, 1981. No. 43448.

1. **Jury Instructions: Appeal and Error.** A party may not tender an instruction to the court and then, after an adverse verdict, object to its submission to the jury.
2. ____: ____. Failure to object to instructions after they are submitted to counsel for review precludes raising objections to said instructions on appeal.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

Schneider & Nisley, P.C., for appellant.

Kay & Kay for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN and NORTON, District Judges.

NORTON, District Judge.

This is an appeal from a jury verdict and the overruling of appellant's motion for judgment notwithstanding verdict or in the alternative for a new trial. We affirm.

The original action was for wrongful death, brought by Harvey R. Wooley, personal representative of the estate of Ty Martin Wooley, deceased, hereinafter referred to as Wooley, against one Janet Kittle, hereinafter referred to as Kittle. The jury returned a general verdict in favor of Kittle. In his appeal Wooley assigns seven errors. For the purposes of this decision we will consider only whether the trial court erred in giving certain instructions to the jury.

Ty Martin Wooley, six-year-old child of Harvey R. and Coralotta Wooley, died as the result of injuries received on October 15, 1978. There is no question that the injuries were the result of an accident involving a 1972 Caprice automobile, owned and operated by Kittle at that time.

Wooley, his wife, a daughter, and the decedent lived in a residence located in Key Estates Mobile Home Park at North Platte, Nebraska, at the time of the accident. The park consisted of 235 lots with approximately 600 people living therein, about half of whom were children. There were no sidewalks adjacent to the lots, nor were there any hard-surfaced play areas or playground equipment. There were two dirt play areas. Evidence indicated that children played in the streets, which were hard-surfaced, and that pedestrians used the streets to move from one area to another.

The Wooley home was located on a cul-de-sac to-

gether with other homes, including that of Kittle and her family. There were four lots on each side of the cul-de-sac. The cul-de-sac was a dead-end street, running south from an east-west street. The Wooley home was located on the east side of the cul-de-sac, and the Kittle home on the west side. Immediately adjacent to the street in front of the Kittle home was a hard-surfaced parking slab 20 feet in depth and 17 feet 9½ inches in width, with space sufficient to park three automobiles. This parking slab was located approximately 13 feet directly east of the Kittle home. Running generally northwest from the northwest corner of the parking slab was a sidewalk approximately 38 feet in length, ending at the front porch of the Kittle home, which porch was located on the northeast corner of the house. The house itself generally ran from north to south, with the front facing to the east.

On the day of the accident Kittle and her husband left their home shortly after lunch to attend a Girl Scout pinning ceremony. They took with them their three children and two other girls. At that time they were riding in the 1972 Caprice automobile, which had been purchased the day before the accident. Kittle's husband was driving. The ceremony lasted about 1½ hours, after which they returned to their home. The Caprice automobile was at that time parked in the middle of the parking slab facing west. Parked immediately north of the Caprice and on the north part of the slab was a Datsun station wagon belonging to Kittle's husband. The Kittle family went into their home. Shortly thereafter, Kittle realized that she had to purchase a present for her older son to take to a birthday party. Together with that son she left the home and walked to the Caprice. She noted a child by the name of John Mashek standing in the front yard of his home, which was located directly across the street from her home. She saw no other children either in the street or near to it. She entered the Caprice

from the left side and her son entered from the right side. After adjusting the seat to compensate for the size difference between her husband and herself she started the engine of the automobile. At that time her daughter came out of the house and stood in front of the Caprice. A conversation ensued, and Kittle stuck her head out of the left side window to talk with her daughter. She then looked in the outside rearview mirror and did not see anything. She stated that she looked both to the north and south. She then adjusted the inside rearview mirror and could still see John Mashek standing in his yard. Kittle then turned to her son and said, "Well, how many bicycles or something do we have to move now?" The question was based on the fact that bicycles and other items would be left upon occasion in the street. Kittle and her son both turned and looked out of the rear window of the Caprice. The only thing visible was John Mashek, who was standing in his yard and looking at Kittle. Kittle remained in a turned around position and proceeded to back the automobile. After going a short distance into the street she felt a bump, caused by something under the car. There was no apparent audible sound. She stopped the automobile, changed gears, and then pulled forward. She could not recall a bump when she drove forward. She thought she had run over a toy.

Kittle then exited the automobile and walked to the rear, at which time she discovered Ty Martin Wooley lying in the street with his feet toward the north and his head toward the south. He had obvious injuries. Beneath him was a skateboard. Evidence in the record indicates that children had been observed riding skateboards on their stomachs prior to the day of the accident. The child never recovered consciousness, and died shortly thereafter.

Two of the assignments of error deal with instruction Nos. 9 and 15 which were given by the trial court. Instruction No. 9 was an instruction requested by

Wooley and appears in the following language: "One of the issues in this case is whether the accident was caused by the conduct of Ty Martin Wooley. If you find the sole proximate cause of the accident was the conduct of Ty M. Wooley, then your verdict should be for the defendant. However, if the plaintiff has proved by a preponderance of the evidence, that some negligence of the defendant as set forth in Instruction No. 2 was the proximate cause or a proximately contributing cause of the accident, then the conduct of Ty M. Wooley could not have been the sole proximate cause thereof, then your verdict on the issue of negligence should be for the plaintiff." Instruction No. 15 was an instruction running to the question of contributory negligence on the part of the decedent's mother, in the following language: "If a mother fails to exercise reasonable care over her child to prevent him from getting out onto a roadway and, as a consequence of the failure, the child did get on the roadway and is killed, the mother's failure to exercise due care constitutes contributory negligence." Both of these instructions were included in the set of proposed instructions given to counsel for the parties prior to submission of the case, and were approved without exception by counsel for Wooley.

Wooley's argument in support of his contention that the giving of instruction No. 9 was error on the part of the trial court actually becomes twofold in its thrust. In essence, he says that this instruction should not have been given in view of the fact that the amended answer of Kittle alleges that the death of the decedent was "proximately caused and contributed to by the negligence of the plaintiff's decedent . . . ." Thus, says Wooley, the manner in which Kittle has framed this defense becomes in actuality a judicial admission by Kittle that the actions of the decedent were not the sole proximate cause of the accident but, if anything, were only contributing; that inasmuch as a child of tender years, such as the decedent, is incapable of

contributory negligence as a matter of law, the giving of instruction No. 9 permitted the jury to speculate on the issue of sole proximate cause, which issue had been removed by Kittle's admission; and that this error resulted in an unconscionable verdict.

This argument is not well taken. The language used in the amended answer by Kittle, while not stated in the words "sole proximate cause," does not say what Wooley claims. To imply that the phrase "proximately caused" should be so narrowly construed within the context in which it is used would simply frustrate the purpose of the law. Of greater importance, however, is the fact that instruction No. 9 was initially requested by Wooley. It is to be presumed that he was as familiar with the pleadings when the instruction was tendered as he is in this appeal. A party may not tender an instruction to the court and then, after an adverse verdict, object to its submission to the jury. *Kaufman v. Tripple*, 180 Neb. 593, 144 N.W.2d 201 (1966).

The other part of the problem with instruction No. 9 is, in reality, an implication which arises when it is read in connection with other instructions submitted to the jury. Is there a possibility that the giving of this instruction, coupled with certain others, might have tended to raise in the minds of the jury a right to speculate on the contributory negligence of the decedent and his mother acting together, leading to a conclusion that this total negligence was sufficient to defeat Wooley's claim? However, it is noted that prior to trial Wooley moved in limine to restrict evidence of contributory negligence on the part of the decedent, which motion was sustained by the trial court. Also, a reading of the instructions in total, and particularly No. 8, indicates that the trial court sufficiently cautioned the jury on the fact that a child of tender years is incapable of contributory negligence. It is fundamental that in the absence of any evidence of misconduct by counsel in arguing the case, or a showing to the contrary, it is to be presumed that the jury

followed the instructions given by the court. There is no evidence of either in this case.

On the basis of the foregoing, one is led to the inescapable conclusion that there is no merit to Wooley's argument that the giving of instruction No. 9 was error on the part of the trial court.

Wooley also objects to the giving of instruction No. 15, arguing that there was insufficient evidence to support this instruction. Once again, it is to be noted that his counsel did not object to this instruction at the conference on instructions held after the reception of evidence and when the parties had rested. Failure to object to instructions after they are submitted to counsel for review precludes raising objections to said instructions on appeal. *Flinn Paving Co., Inc. v. Sanitary & Improvement Dist. No. 227*, 198 Neb. 542, 254 N.W.2d 78 (1977).

A review of the evidence received at the time of trial discloses that the mother of the child had lived in the Key Estates Mobile Home Park, at the same location, for approximately 4 months preceding the accident of October 15, 1978. There is nothing to indicate that she was confined to the limits of her home, and in fact there is evidence that she participated in family activities which took her out and about the park. One could therefore logically assume that she was familiar with the general physical nature and construction of the area and the lack of playground facilities for the use of children. On the day in question, and at the time of the accident, she was inside her home "working around the house." She acknowledged that she was responsible for two children at that time. She knew her son was outside "at the Mashek place playing with John." She stated that she "could see him from the window." However, she did not see the accident. It would appear that there was sufficient evidence presented to justify the giving of instruction No. 15.

There being no error on the part of the trial court in the giving of these two instructions, the verdict

of the jury and the judgment of the trial court in overruling the motion for judgment notwithstanding verdict or a new trial are affirmed.

AFFIRMED.

IN RE INTEREST OF MARGARET BURBANKS, MARY RIMA, AND MELODY RIMA, CHILDREN UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA ET AL., APPELLEES, V. WAYNE RIMA AND SHIELA RIMA, APPELLANTS.

310 N.W.2d 138

Filed September 11, 1981. No. 43592.

1. **Appeal and Error.** Under Neb. Ct. R. 8.a.2.(3) (Rev. 1977), we may, on appeal, notice plain errors not assigned.
2. **Parental Rights.** Parental rights may not be terminated except by clear and convincing evidence.
3. **Guardians Ad Litem: Waiver.** A guardian ad litem may not waive the substantive rights of the ward, but must require proper legal proof.
4. **Parental Rights.** Parental rights may not be terminated under the following provision of Neb. Rev. Stat. § 43-209(6) (Reissue 1978): "Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination," except where the correctional efforts have been directed to the conditions upon which the adjudication was based.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Reversed and remanded with directions.

Terry Malcom of Colfer, Lyons, Wood, Malcom & Goodwin for appellants.

Arlan G. Wine, Special County Attorney, for appellees.

Bert E. Blackwell, guardian ad litem, for minor children.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This appeal involves three separate actions for the termination of the parental rights of Wayne and Shiela Rima to three children, Margaret Burbanks, Mary Rima, and Melody Rima. The county court of Red Willow County, after hearing, granted the prayer for termination and, on appeal to the District Court, the judgment was affirmed. The three cases were consolidated for trial in the county and District Courts and for argument and briefing in this court.

The parents appeal to this court and make and argue the following assignments of error: (1) The evidence does not sustain the finding of the court that their parental rights should be terminated on the ground stated in Neb. Rev. Stat. § 43-209(6) (Reissue 1978), to wit, "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination," made at the adjudication hearing, namely, that the parents have failed and neglected to provide "special care made necessary by the mental condition of the [children]," Neb. Rev. Stat. § 43-202(2)(d) (Reissue 1978); (2) It is not proper to terminate parental rights except for intentional conduct detrimental to or wanton disregard for the welfare of the children; and (3) It is improper and unlawful to terminate parental rights for the principal purpose of facilitating adoption when the record establishes that this is the purpose of the proceedings.

The joint brief of the county attorney and the guardian ad litem for the children does not directly join issue with the position taken by the parents in their brief. Rather, the appellees argue that proof of the Rimas' poor financial condition and lack of ability to provide adequate nutritional and basic child care justifies the termination. They also take the position that remedial measures taken under the court's supervision under the provisions of § 43-209(6) need not be directly related to remedying the conditions or situation upon which the adjudication was based: in this instance, the

alleged mental condition of the children and neglect of the parents to provide special care directed to that condition.

A proper perspective for determining the issues raised on this appeal can be set only by summarizing the statutory framework governing the proceedings and the actual proceedings as they occurred in this case.

The original jurisdiction of courts in juvenile matters is defined by § 43-202. Six areas or grounds of jurisdiction are defined. The particular section of that statute under which the court found it had jurisdiction, as alleged in the supplemental petition on which the case was tried, was that subsection which provides: "(2) Exclusive original jurisdiction as to any child under the age of eighteen years . . . (d) whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the child." Section 43-209 lists six grounds upon which parental rights may be terminated. The ground upon which the court terminated the parental rights was the following: "(6) Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, *have failed to correct the conditions leading to the determination.*" (Emphasis supplied.) § 43-209.

Neb. Rev. Stat. § 43-206.03 (Reissue 1978) prescribes the rules of procedure applicable to juvenile cases. The portion of the proceeding applicable in this case may be summarized as follows. Subsections (3) and (4) of the statute separate the proceedings into two parts. First, the court must determine whether or not the child comes within one of the categories described in § 43-202. This is referred to as the adjudication portion of the hearing, and in cases where subsections (1) and (2) of that statute are applicable, the finding must be supported by a preponderance of the evidence and the court must designate which subdivision or

subdivisions the child is within. The statute then provides that the court shall proceed to an inquiry into the proper disposition to be made of such child.

This court has held that parental rights may not be terminated except by clear and convincing evidence. *State v. Jenkins*, 198 Neb. 311, 252 N.W.2d 280 (1977). Review by this court is de novo on the record. *State v. Jenkins, supra.* We also may, of course, notice plain error not assigned. Neb. Ct. R. 8.a.2.(3) (Rev. 1977). We reverse the cause and remand to the District Court for further proceedings.

We, therefore, first examine the evidence to determine whether the adjudication finding that the parents neglected or refused to provide special care made necessary by the mental condition of each child is supported by a preponderance of the evidence and whether the determination made by the court that reasonable efforts by the parents under the direction of the court have failed to correct the condition is proved by clear and convincing evidence.

Before entering upon that inquiry, a brief reference as to what occurred procedurally is appropriate.

The original petition filed in the county court on May 25, 1976, alleged that the children were neglected because of the mental retardation of the parents and prayed for an award of temporary custody of the children to the Department of Public Welfare of Red Willow County. The parents, on June 4, 1976, signed a stipulation agreeing to the placement of temporary custody of the children in the Red Willow County Department of Public Welfare. A guardian ad litem was apparently appointed for the parents on the same day. The children had been removed from the home about the time of the filing of the petition in the latter part of May. Journal entries dated June 4, 1976, and November 10, 1976, recite that the Rimas were questioned by the guardian ad litem and that they understood the nature of the stipulation they had signed. There is in the record another order dated July 23,

1976, appointing a guardian ad litem. The reason for the multiplicity of these orders does not appear and the bill of exceptions contains no evidence with reference to the testimony.

After this, the guardian ad litem resigned because he had been elected or appointed county attorney and would have had a conflict of interest, and a special prosecutor was appointed.

On March 16, 1977, supplemental petitions were filed in the county court reciting that on *June 4, 1976*, each child was a neglected child and, without specificity, alleging that the parents "have repeatedly neglected the child and refused to give the child necessary parental care and protection." The supplemental petitions repeated the allegations that the parents were, because of mental deficiency, unable to discharge parental responsibilities and that the condition would continue for an indeterminate period. They further alleged that the child "suffers from certain mental and physical deficiencies and needs special parental care and it would be in the best interests of said child to terminate all parental rights."

A guardian ad litem for the parents was appointed on March 16, 1977, and a guardian ad litem for the children was appointed on June 17, 1977. The first hearing at which any evidence was adduced was on June 17, 1977. It is to be noted that this was more than 1 year after the proceedings were first begun. That hearing was the first of a series, continuing at intervals during the summer of 1977. At these hearings, the testimony covered the period beginning sometime in 1974, when, apparently, the Department of Public Welfare first began working with the Rimas, until the summer of 1977. At that time the children had been in foster care for more than a year.

At the conclusion of these hearings, on September 22, 1977, the two guardians ad litem and the special county attorney entered into stipulations as follows: "1. That the said [name of child] is a dependent and

neglected child within the meaning of Nebraska R.R.S., Section 43-206.03 and Nebraska R.R.S., Section 43-202 (2) (D), in that the parents, Wayne Rima and Sheila [sic] Rima, have neglected or refused to provide special care made necessary by the mental condition of the child.

"2. That the parties hereto jointly Stipulate that the Court may enter an Order granting the care, custody and control of said minor child to the Department of Public Welfare for placement in a Foster Home. That the Court shall further Order that the placement of said child in the custody and control of the Department of Public Welfare shall continue until such time as it is shown to the Court that Wayne Rima and Sheila [sic] Rima are able to provide the special care made necessary by the mental condition of the children or until further order of the Court.

"3. That Thomas Blount, Special County Attorney, in and for Red Willow County, Nebraska, Stipulates that the Court may enter an Order dismissing that portion of the proceedings pertaining to and praying for the termination of the parental rights of Wayne Rima and Sheila [sic] Rima." Pursuant to those stipulations, the court entered orders finding that: "IT IS THEREFORE, ORDERED, that the care, custody and control of the said [name of child], a child under the age of Eighteen (18) years, is granted to the Department of Public Welfare for placement in a Foster Home until such time as it is shown to the Court that Wayne Rima and Sheila [sic] Rima are able to provide the Special Care made necessary by the mental condition of the children or until further order of the Court.

"IT IS FURTHER ORDERED, that Wayne Rima and Sheila [sic] Rima, the parents of the minor child, shall work with and cooperate with the Department of Public Welfare and the Multi-County Social Service Unit in an effort to be able to provide for the Special Care made necessary by the mental condition of the

child and they shall make all reasonable efforts to correct the conditions leading to the determination herein."

In November 1978, the county attorney filed motions in each of the cases to terminate the parental rights. The motions recited that on June 4, 1976, the child was found to be dependent and neglected; that Multi-County Social Service Unit 122 (hereinafter M-CSSU) has made reasonable efforts to correct the conditions necessitating the removal of the child from the home, but the efforts have been unsuccessful in correcting said conditions; that the child has been living in a foster home since before June 4, 1976; and that the foster parents would make suitable adoptive parents and are willing to adopt if the parental rights are terminated.

On December 22, 1978, the county attorney filed a motion applicable to all three children to terminate parental rights. It, too, recited that the children had been neglected and dependent as defined by § 43-202(2); that on September 22, 1977, the three children had been found by the court to be dependent and neglected as defined by § 43-202(2)(d) for the reason that the parents, Wayne and Shiela Rima, neglected or refused to provide special care made necessary by the mental conditions of the children; that from October 3, 1977, to November 30, 1978, M-CSSU made reasonable efforts under the direction of the court to help correct the conditions leading to the determination stated in paragraphs 2 and 3, but these have been unsuccessful in correcting the conditions; and that it would be in the best interests of the children that parental rights be terminated.

In April of 1979, the disposition hearing was held, evidence was adduced, and on May 1, 1979, the court entered an order terminating the parental rights and awarding custody and control of the children to the Department of Public Welfare of the State of Nebraska. The findings upon which the order was based were

the following:

"1. Above said minor children have previously been found by this Court to be children as described in Subdivision (1) and (2) of Section 43-202[(2)] R.R.S. 1978 Cumulative Supplement.

"2. Reasonable efforts, under the direction of the Court, have failed to correct the conditions leading to the determination as hereinabove set forth in paragraph #1.

"3. It is in the best interest of said minor children to terminate the parental rights of natural parents, Wayne and Shiela Rima to said children.

"4. Care, custody and control of said minor children should be awarded to the State of Nebraska, Department of Public Welfare."

We will now summarize separately the evidence adduced at the two hearings. The period covered by the evidence at the adjudication hearing related to a period beginning sometime in 1974, when the Department of Public Welfare apparently began working with the Rima family, through the summer of 1977. At the time the children were removed from the home of their parents in the latter part of May 1976, their approximate ages were: Melody, 3 months; Mary, 19 months; and Margaret, 3 years 4 months.

Prior to their removal, Margaret was attending a school apparently operated by M-CSSU, called the Child Development Center (hereafter CDC). The function of this school was to enhance the social development of children having handicaps.

The evidence presented tended to support the conclusion that the Rima children were lagging in physical development and did not appear well nourished; that a sufficient quantity and variety of foods were not always on hand in the home; and that Shiela, the mother, lacked adequate knowledge in the matters of balanced nutrition and meal preparation. This evidence was based upon the testimony of a health department nurse who visited the home at

2-month intervals for a period of about a year and a half and a staff homemaker who visited the home about 80 times from July 1974 until September 1976. These two witnesses regarded their efforts to teach and motivate Shiela as unsuccessful.

A particular complaint made with reference to Melody was that the mother was feeding her whole cow's milk to which Karo syrup was added, instead of the formula which the doctor recommended. Shiela testified that she had used the whole milk and Karo syrup combination for 3 weeks before the child was removed from the home and that the prior use of the formula suggested by the doctor did not agree with the baby. She made the change on the recommendation of her mother. At birth, Melody weighed 6 pounds 4 ounces. At age 3 months she weighed 8 pounds 6 ounces, and at that time, a few days before removal, she was hospitalized for examination. After 6 months of foster care, Melody weighed 15 pounds 5 ounces, which was light for her age, approximately the fifth percentile.

No medical or other expert evidence was introduced to support the allegation of mental retardation of the parents. The head of the M-CSSU testified that, in her opinion, the Rimas did not have the mental capability to educate their children and did not have the mental ability to discharge parental responsibilities. The parents were called by the State as witnesses. The father testified that he had been an inmate of the Beatrice home for 10 years, ending in 1968. According to his testimony he was confined for a sexual crime that he was alleged to have committed. No records from the Beatrice home were admitted in evidence. He acknowledged that he is illiterate. His answers, however, were responsive to the questions asked. However, it may be inferred that he did not understand some of the questions. He was asked if he ever communicated with the children and whether his wife ever communicated with the children. As to himself,

he said, "No, not really." As to Shiela he said he did not know. However, later, when the questions were phrased differently, he indicated that both he and his wife talked to the children. He testified to the part he played in the care of the children, such as feeding one while Shiela fed the other, helping "potty-train" Margaret by putting her on the stool, giving "horseback" rides, and putting the children to bed at night. He stated that he loved his children and did not want them taken from him. He further testified as to the kind of meals prepared by his wife, which testimony contradicted that of the previous witnesses. Wayne's testimony was that Shiela prepared suppers which consisted of meat, potatoes, vegetables, and canned fruit.

He further stated that he had been trained at Milford as a short-order cook; however, the evidence does not indicate that he ever worked at that employment. His employment during his marriage had been for a roofing company as an operator of the hot pot; for a doctor (apparently a podiatrist) making, in Wayne's words, "patterns . . . for correcting the feet"; and as a dishwasher. He stated that he had worked for about a year in each of the jobs. All the jobs were at or near minimum wages, ranging from $2.30 to $3.25 per hour. He acknowledged that at times he had not worked and that this was because his stomach bothered him and he was sick on those occasions. He apparently did not understand arithmetic, as the total wages he said he earned during a 2-week period when he worked fulltime did not seem to correspond to the wage rate.

Shiela's answers were also responsive to the questions asked. Her testimony as to meal preparation contradicted that of the social workers. It is apparent that she is not a very intelligent woman. She testified that she asked that the "agreements" (to which we will make later references) be read and explained to her because she did not understand the big words. One of the social workers testified that when written

messages were sent to Shiela from the school, she always asked the social worker what they said. Shiela testified that she loved her children and did not want the children taken from her and that she would have liked to visit them more often than was permitted after they were taken away.

At the time in 1976 when the Rimas signed the consent to have the children placed in temporary care of the Department of Public Welfare, Shiela testified they were having financial difficulties, Wayne being unemployed at that time.

The evidence indicates that the family income consisted of Wayne's earnings, a disability check received by Shiela, and aid to dependent children. Shiela's disability check was $167.80 and was Supplemental Security Income. Her disability apparently made the family eligible for the ADC payments; the amount of the latter payment varied, depending upon Wayne's income, and, during the 2 years before the children were removed, it varied from the maximum of $294 when Wayne was unemployed, down to $122.46.

Shiela testified that her disability was because of difficulty with her eyes and with her hands. One of the social workers testified, apparently on a hearsay basis, that the disability was based upon her mental incapacity. Shiela had been receiving these payments since she was 17 years of age. At the time of the hearing she was 26.

The evidence as to the mental condition of the children consisted of the testimony of the director of the CDC and four short letter reports from physicians. A good deal of this evidence relates to a time after the children were taken from the home.

The director of the CDC made a first acquaintance with the two older children, Margaret and Mary, at the CDC in September of 1975. At that time Margaret would have been about 2 years 7 months of age and Mary about 11 months of age. She saw Melody at her home shortly after her birth. Margaret had been

attending the CDC from sometime prior to September 1975 and was still there at the time of the director's testimony on June 22, 1977, more than a year after being placed in foster care. Mary did not begin attending the center until January 1977, roughly 7 months after being placed in foster care.

The director of the school testified that Margaret was tested and then certain "goals" were established for her and the teaching was directed to accomplish those goals. These goals were established on October 13, 1975, when Margaret was 2 years 8 months of age and were, according to the witness' testimony, as follows: "Margaret will eat with a spoon without spilling it's [sic] baby's food; Margaret will pull her pants up after toileting without prompting; Margaret will put on an outside garment such as a coat; Margaret will spontaneously name 25 noun pictures; Margaret will point to familiar objects — this was once worked on in previous goals — in a book on request, objects that we knew she knew; Margaret will demonstrate an unspoken awareness of mind by not allowing personal objects to be shared; she will greet peers when reminded by saying 'hi'; she will match primary colors; she will obey commands of stop and go when on a walk; she will identify by pointing five body parts on command: ear, nose, mouth, eyes and hair."

As time went on, new "goals" were established. After 6 months Margaret did not speak in sentences, but had a vocabulary of about 60 words. The testing referred to in the paragraph above was referred to as the "Portage" test. It tested the child in five separate areas. The test was not designed to determine whether the child's environment was at fault or whether deficiencies were due to innate intelligence. The areas of testing were self-help, where a "normal" 3-year-old would have 47 specific skills; cognition, where the child should have 52; motor skills, where the child should have 74; language, where the child should have 53; and socialization, where the child

should have 49. Margaret, when tested, had 36 of the self-help skills, 40 of the cognition skills, 57 of the motor skills, 33 of the language skills, and 14 of the skills in socialization.

The testimony indicated that all children did not develop at the same speed, and the witness stated she did not know whether the tests took that into account or not. The only foundation laid for the validity of the Portage test was that it was used in other like schools in the State of Nebraska and had been developed by six people in the State of Wisconsin. By June of 1976 Margaret had achieved most of the goals. The witness rendered her opinion that Margaret was a mentally retarded child and recommended to the parents that when Margaret entered school she be placed in special education.

The witness further recommended that Margaret, whether she remained in foster care or returned to her parents, continue in the CDC. She also testified that a learning disability does not necessarily assume or show that there are environmental problems, and that learning disabilities can exist without environmental problems.

Melody was enrolled in the school in February 1977, that is, at the age of 1 year, and after she had been in foster care for about 9 months.

Mary entered the CDC in March of 1976 at about 18 months of age and about 2 or 3 months before she was removed from the home. Mary was not given the Portage test until January of 1977, after having lived in foster care for 7 or 8 months. She scored 34 out of 52 in cognition; 35 out of 47 in self-help; 51 out of 74 in motor development; 23 out of 53 in language; and 29 out of 49 in socialization. In the witness' opinion Mary was mentally retarded.

As previously mentioned, the sole medical evidence adduced was received in the form of letter reports from physicians. Two of these are extremely brief. The first was dated July 26, 1974. It recited that because of

the "mental limitations" of the parents and "the limited social and economic environment of the Rima child . . . she would benefit from the Child Development Center." Although no child was identified in the report, the date of the letter, taken together with the evidence we have already recited, would indicate that the child referred to was Margaret. A foundation for the various conclusions in the letter was not laid.

The second letter pertained to Mary and was dated March 19, 1976. It was addressed to the Red Willow County Welfare Department and stated: "In pursuant [sic] to our conversation I just want to affirm that Mary Alice Rima is physically fit for school. She needs more attention with regard to her social development, and also has a need for evaluation for her diet."

The third letter was dated May 24, 1976. It referred to "screening" examinations of the Rima children and stated that Melody had serious growth retardation, weighing only 8 pounds 6 ounces at 3 months, and that she had lost weight in the last month. It also stated that the child was anemic and needed better nutrition. As to Mary, it stated that she was a very little girl, in the tenth percentile for weight, and that she was very docile, which was unusual for her age. It suggested that she needed more adult attention and nutrition. As to Margaret, the report recited that she was 3 years of age, somewhat small for her age, and docile. It suggested that she needed more nutrition and perhaps more adult attention. The letter recommended that the infant, Melody, be admitted to the hospital.

The fourth letter related to Melody and was dated January 11, 1977. It referred to a medical history given by the director of the welfare department. It recited the birth weight was 6 pounds 4 ounces and that prenatal care was not given until 1 month prior to birth. It noted that there were no neonatal problems. At the time of examination she was in the fiftieth percentile for height and in the fifth percentile for weight, 15 pounds 5 ounces. Problems noted at that

time were: (1) Otitis for the past month for which she was being treated; and (2) Microcephaly (small skull), otherwise the skull was normal; the doctor "imagine[d]" the small skull was inherited, but would need skull measurements of the parents to determine whether their skulls were within normal limits; and (3) Developmental delays "most likely the result of the microcephaly, which again may well be hereditary in origin." He recommended that she be followed as to her weight as well as head circumference and that, depending on what the parents' head circumferences were and how Melody developed, perhaps future testing would be needed. He recommended she be entered in the CDC at McCook. It is to be noted that at this time Melody had been in foster care for 7½ months.

The foster father of Margaret was called, as was the first foster mother of Mary and Melody. Their testimony was limited to the period of the first 30 days that the children were in their care. The substance of the testimony of Margaret's foster father was that Margaret was very quiet, very obedient, and ate well; she did not sleep well at night; she played best with children about a year younger than herself; she had to be urged to get out of bed by herself; she was slow in speech and could not count; and she was thin compared with other 3-year-olds. She laughed when her foster parents played with her. He stated that he (and apparently his wife) wanted to adopt Margaret. He and his wife were the parents of a 9½-year-old daughter afflicted with cerebral palsy. When Margaret was first in the home, the following incident occurred. They placed their child in a wheelchair and put a pillow or other padding under her feet. Margaret, unknown to them, observed this and the next time the child was placed in the wheelchair by her father, Margaret, on her own initiative, obtained a pillow and put it in place for the child's feet.

The temporary foster parent of Mary and Melody

had these children in her care from May 1976 to the first of December 1976, and again had Melody in temporary care from January 1, 1977, to April 1, 1977. The foster mother had picked up Melody at the hospital in May 1976 after the child had been there for 3 days. At that time, the child weighed less than 10 pounds and was pale and limp. Mary had been picked up at the social service office within about 10 minutes of the time she was removed from her grandmother's home. Mary did not talk; she did not walk well, having a rather peculiar gait; she ate "voraciously"; and she ate with her fingers. Some time elapsed before she played with the other children. When she was received she had a distended stomach. A cleft lip was partially repaired surgically while the child was in her custody. It took about a month before Mary began to respond and want to play with her foster father.

Following removal of the children from the Rima home, the Rimas and the M-CSSU entered into two "agreements" prepared by the M-CSSU. The first covered the period from October 3, 1977, through January 11, 1978, and was signed by the Rimas; the second covered the period from January 12, 1978, through June 30, 1978, and was executed by the guardian ad litem for the parents but not by the parents. These agreements recited what was expected of the Rimas by the agency and what the agency would do. The first agreement required: (1) Wayne to maintain steady and full-time employment; (2) Wayne and Shiela to pay their bills on time; (3) Wayne and Shiela to live within their means and meet with the social worker once a week to work on budgeting, and Shiela to furnish receipts for all expenditures; and (4) Wayne and Shiela to keep the appointments made by the worker for visitations with the children. Visitations were one per month for 1 hour. Because the foster home was not in McCook, the visitations alternated between McCook and some other city, such as Lexing-

ton. The worker's responsibilities under the agreement were to help Shiela with budgeting; arrange for the monthly visitations; and evaluate the Rimas' progress in budgeting, stability of the home, and dependability in keeping scheduled appointments.

The second agreement made the same requirements of the Rimas but in much more detail. It, for example, gave priority to the payment of certain bills: rent, gas, and electricity, and required detailed record-keeping in the matter of the budget. It added these requirements: The Rimas purchase food stamps each month, visits by a staff homemaker to assist in planning nutritious meals, and attendance by the Rimas at parenting classes. It increased visitations by bringing all the children to the Rima home once a month for a 4-hour visitation and gave the Rimas the opportunity to visit Melody and Mary once a month in Lexington and Margaret in Culbertson.

On April 4, 5, and 6, 1979, trial on the issue of termination of parental rights was held. The guardians ad litem served as attorneys for their wards as they had from the time of their appointment. The county attorney had, prior to trial, filed a motion to permit psychological evaluation of the parents. On January 25, 1979, the court had ruled that the mental condition of the parents was not an issue and overruled the motion. The evidence adduced at the termination hearing was directed primarily to (1) whether or not the Rimas had fulfilled their "agreements," and (2) the results of psychological tests of the children, all of which took place while the children were in foster care.

The children were examined by Jack Dodge, a school psychologist. He tested Margaret on September 29, 1976, about 4 months after her removal from the home of her parents. This test was made in McCook when Margaret was 3 years 8 months old. He used the Stanford-Binet test and the result indicated to him an IQ of 70, which he described as "borderline mental retardation." He also gave her a Vineland "develop-

mental" test, the results of which he did not remember. He recommended that Margaret continue at the CDC where, as we have noted, she had been in attendance previous to the time she was taken from her home.

Mr. Dodge saw Mary on two occasions. The first was when she was about 1½ years of age, which was 2 months before her removal from the home, and again when she was 2 years of age. Part of this second examination was an interview of the persons who were at that time the foster parents. The first test which he administered indicated an IQ of 83. The second test indicated an IQ of 90, which was about 1 month behind her chronological age. These tests were designed to indicate the child's social age as compared with chronological age.

He examined Melody at 11 months of age. This would be about 8 months after her removal. Earlier he had testified that children under 1 year of age are very difficult to evaluate. He gave her a score of 73, indicating that she was 2 or 3 months delayed.

He stated that he could not express any opinion as to the cause of the "lags" in the children and could not express any opinion as to whether the "lags" were innate or the result of environmental factors.

The children were examined by Jerry Mandel, Ph.D., a psychologist, on December 17, 27, and 29, 1978, and he gave his opinion on the social and intellectual functioning of the children at that time. The bases of the opinion were histories given him by the then foster parents (which histories included what the foster parents had been told by the social agencies); reports of earlier examinations made at the Meyer Children's Rehabilitation Institute at the University of Nebraska Medical Center, which latter tests were not admitted into evidence but which are in the record; tests which he administered to Margaret and Mary; and observations he had made of Melody, as he considered her too young for testing.

The children's ages at the time of testing by Dr.

Mandel were, respectively, 5 years 11 months; 4 years 3 months; and 2 years 10 months. He gave the two older children three tests: the WISC, a standard IQ test for children; the Bender-Gestalt visual motor test; and the Draw-a-Person test. He stated that Margaret's IQ was on the borderline of normal and dull-normal, i.e., 90. In his written report, which is also in evidence, he stated that she was functioning at the low end of her intellectual ability. He indicated that he considered her visual motor skills to be at about the level of 3 years 4 months. He considered her vocabulary adequate for her age. He considered that she had the potential for normal development.

Mary scored 104 in her IQ test, a score of 100 being considered average. She was functioning at the level of a 5½-year-old in cognitive skills. Her articulation was unclear, she had a vocabulary of 2,000 words, and she spoke in sentences. This latter information was not based on testing, but on history received from the foster parents.

Melody was functioning at a developmental level considered on a par with her chronological age. The substance of Mandel's conclusions was that the children had not, between birth and 3 years of age, received the stimulation necessary for the social growth at normal rates.

In addition to the two psychologists, the State called three social workers, three of Wayne's former employers, two representatives of creditors of the Rimas, and the present foster mothers of the three girls. We will attempt to summarize their testimony in an organized fashion, although it is somewhat difficult because it was, for the most part, presented in an unorganized way.

During the years 1977 and 1978 and previously, Wayne worked for two roofing contractors. This work was seasonal, covering about 5 or 6 months of the year with interruptions because of inclement weather. From one employer, Wayne earned $562.65 in 1977 and

$356.75 in 1978. In 1978 he also worked for another roofer, being employed from April 5 through August 16. The work was 5 days per week. He originally worked for $3 an hour but later the pay was raised to $3.25. Except for a period in April or May when Wayne was injured, he worked regularly except in July and August when the regularity tapered off. Wayne was not fired. This employer believed he, at that time, went to work for the Cornbelt Chemical Company. He considered Wayne an average worker, although during the last part of his employment he missed more work than the other employees. Wayne's employment with Cornbelt Chemical was, according to his supervisor, only a temporary job when help was needed. He worked there from August 14 to August 19, 1978.

Other evidence of family income came through the testimony of a social worker in connection with the matter of whether the Rimas were living within their income and accounting by receipts for all expenditures. This testimony covered the period beginning October 1977 through November 1978. The source of the witness' information was the accountings rendered by the Rimas. This indicated a family income for the period (excluding September 1978 for which the witness had mislaid the information) of $5,618.20. The Rimas could furnish receipts for only $4,129.93. One of the social workers testified that in the wintertime Wayne was unable to obtain employment.

The testimony with reference to the matter of visitations with the children showed that the Rimas kept all of their scheduled visitations for McCook. However, all except one of nine appointments scheduled for Lexington were canceled. Some of these, the number not specified, were canceled by the M-CSSU. A social worker testified that some of the cancellations by the Rimas were because they did not have a car or did not have money for gasoline. Related to this evidence is the testimony of one of the social workers. When asked if the Rimas spent money for luxuries or un-

necessary things, she replied that they had purchased a washing machine, a television set, a coffeemaker, and "I believe" two vehicles. So, on the one hand, it appears that the M-CSSU was complaining that appointments in Lexington were not kept, yet, on the other, it considered the purchase of an auto, which in light of the Rimas' income must have been a clunker, as a luxury. The witness also testified that Shiela had requested that more of the visits be scheduled in McCook. The worker also testified that the Rimas took two automobile trips, one of which, at least, was at a time when a visitation could have taken place.

The evidence indicates that the Rimas attended only one of nine "parenting" sessions.

Relative to the matter of paying bills on time, the evidence was as follows. The Rimas paid $100 for rent. It apparently was never delinquent and was the first thing paid. Two kinds of bills were not paid regularly and on time. These were the gas bill and the telephone bill. The Rimas had telephone service only during the period June 15 to September 11, 1978. On the latter date, $33.77 was unpaid and telephone service was disconnected by the company. The evidence with reference to the gas bill covers the period June 10, 1976, to April 5, 1979. The Rimas did not pay their gas bills dated 3-15-77, 4-11-77, 5-10-77, and 6-10-77, totaling $112.17, and service was disconnected. They apparently went without gas service thereafter until on October 11, 1977, when the Crisis Intervention Program paid the bill and service was reconnected on November 1, 1977. Thereafter, the Rimas made periodic payments on the gas bill, totaling $125.14, and by June there was a delinquency, including penalties for late payment, in the amount of $122.20. This was paid by the Emergency Energy Program on June 8, 1978. On July 10, 1978, the Rimas had paid their bill in advance and had a $23.95 credit. Thereafter, they made periodic payments, and on April 5, 1979, there was a delinquency of $64.02. There is no other

evidence of failure to pay bills on time. This was the situation at the time of trial.

The second agreement required the Rimas to purchase food stamps monthly. The evidence indicated that during 1977 and 1978 they purchased food stamps on only one occasion.

The substance of the evidence with reference to meal planning and preparation and housekeeping was this. Shiela demonstrated to the social worker that she was able to plan a meal properly. The worker, however, never saw her prepare a nutritious meal and concluded that she did not because the necessary supplies were not in the house on the occasions of her visits. The evidence was that the home was clean 9 out of 10 times. However, the children's room was empty and dirty as the Rimas had disposed of the bed and other furnishings, apparently to get funds to aid their existence.

Margaret's foster mother testified that she received Margaret in her home on May 24, 1976. It may be noted that this was the day before the original petition was filed in the county court. Margaret was 3 years 3 months of age at that time. She was a thin child and did not appear healthy. Margaret was acquainted with the foster parents' only daughter, who was afflicted with cerebral palsy, because both were enrolled in the CDC at McCook. Margaret treated the daughter kindly. Margaret continued in the CDC program until the January preceding the witness' testimony, at which time the foster parents were advised that she needed to be with more normal children. Thereafter, Margaret went to CDC 3 days a week and preschool 2 days a week. The foster parents wish to adopt Margaret.

The foster mother of Mary, the assistant director of the CDC program at Cozad, received the child on January 4, 1977, when she was 2 years 3 months old (after having been in other foster care for 7 months); she was not toilet trained. She was always loving and

never shy. She understood language and what was asked of her, but did not put words together until 1978. She was being continued in the CDC program in McCook as she still needed speech therapy. The foster parents want to adopt Mary but would accept long-term foster care.

Melody's foster mother, a social worker, received the child on April 4, 1977, about 10 months after Melody was taken from her parents. At that time she was very small, just able to sit up. In the witness' opinion, the child had poor muscle tone from the hips down. She did not crawl. The special care being given her by the foster parents was to work along with the professionals. The foster mother considered that she had speech problems. She was unable to crawl on all fours, but pulled herself along with her arms and legs. The foster parents want very much to adopt Melody but would accept long-term foster care, and they are willing to accept almost anything rather than give her up. The witness was also permitted to testify without objection to certain hearsay testimony about the child's alleged small head size. She testified that the doctors "theorized" that it had been the consequence of malnutrition and that she had outgrown it. She had been tested and was "genetically normal."

There are a large number of irregularities, and procedural and substantive errors, appearing in the record which, if tolerated or approved by this court, would tend, if followed in every case, to make a petition for termination of parental rights a self-fulfilling prophecy.

We list these in somewhat chronological order and in an abbreviated form before we discuss such of them as we find necessary. (1) The evidence indicates that the children were removed from the home before the petition was filed, and the record, which apparently is supposed to be complete, does not indicate that the procedures for emergency removal provided by Neb. Rev. Stat. § 43-206(5) (Reissue

1978) were followed; (2) The execution of a stipulation by the allegedly mentally retarded parents placing the custody of the children in the Department of Public Welfare; (3) The affidavit of the director of the M-CSSU attached to the original petition, which, it is to be inferred, was the foundation for the removal, states at least one important alleged fact which the later record establishes is false, i.e., that Melody's weight at 3 months was less than her birth weight; (4) The delay of more than 1 year in holding the adjudication hearing, during a substantial portion of which time both the allegedly retarded parents and the children were without representation by guardian ad litem or counsel; (5) A substantial portion of the important and relevant evidence adduced and admitted at the adjudication hearing was either hearsay or admitted without appropriate foundation, contrary to the statutory requirement that the usual rules of evidence apply, Neb. Rev. Stat. § 43-206.03 (Reissue 1978); (6) The fact that the adjudication order and finding were based upon a stipulation between the State and the guardians ad litem rather than evidence, contrary to legal precedents which provide that, although such guardians may enter into stipulations which merely facilitate the procedure, they have no right to waive or stipulate away the substantive rights of their wards (see authorities later cited in the discussion); and (7) The legal and evidentiary disparity which exists between the basis of the adjudication and the requirement of subsection (6) of § 43-209 which provides that termination must be based upon failure to correct conditions leading to the determination of neglect at the adjudication.

Mental deficiency is not a legal term but, rather, a fact question. It includes those situations where there is a substantial impairment of the will. 44 C.J.S. *Insane Persons* § 2 (1945). Section 43-209 requires that where termination of parental rights is sought because of mental deficiency of the parents, a

guardian ad litem be appointed. The delay in the appointment of a guardian ad litem for the parents and the children and the long delay in holding the adjudication hearing do, in our judgment, constitute a lack of due process in that it deprived the parents of their parental rights under the "liberty" provision of Neb. Const. art. 1, § 3. It also may have constituted a lack of due process as far as the children are concerned, for they are entitled to the care of their natural parents and association with their siblings.

The statutes do contemplate that children may be removed from parental care immediately on the filing of the petition where the welfare of the child requires immediate action. Neb. Rev. Stat. §§ 43-206(5) and 43-205.01(3) (Reissue 1978). The record does not establish that these statutes were complied with.

Nonetheless, these procedural and substantive errors cannot be remedied by mere reversal and dismissal, for we must, of course, consider the welfare of the children. The allegations and indications in the record indicate they may have been neglected in ways other than that on which the adjudication was based, and further remedial measures or even termination of parental rights may be necessary.

As we have noted, the adjudication, based upon the proposition that the children needed special care because of their mental condition, was entered pursuant to a stipulation by the guardians ad litem and the State. The mental condition referred to in § 43-202(2)(d), read in the context of the various other grounds for invoking the jurisdiction of the court, we believe, refers to some inherent mental condition. It cannot be said that there is any competent evidence to support the finding that the children suffered from any special mental condition or that the parents refused or neglected to provide that special care. Margaret, at the time of her removal from the home, was then in attendance at the CDC. The evidence was that, even if foster care was to be

continued, Margaret's participation in the CDC program should continue. The sole evidence with reference to Margaret's mental condition was the hearsay statement of one physician that there was some indication that she was mentally retarded, but that it was hard to say at her age. There is not one scintilla of evidence that either Mary or Melody suffered from such a mental condition. Later evidence adduced at the termination hearing tends to completely rebut the proposition that they suffered from some mental condition which required special care. Rather, it tended to show that they were normal children.

A guardian ad litem may not waive the substantive rights of the ward, but must require proper legal proof. *First Trust Co. v. Hammond*, 139 Neb. 546, 298 N.W. 144 (1941); *In re Estate of Manning*, 85 Neb. 60, 122 N.W. 711 (1909); *Wirth v. Weigand*, 85 Neb. 115, 122 N.W. 714 (1909); *Mattson v. Mattson*, 29 Wash. 417, 69 P. 1087 (1902); *Knight v. Waggoner*, 214 S.W. 690 (Tex. Civ. App. 1919); *Cochran v. Cochran*, 277 Ill. 244, 115 N.E. 142 (1917); *Peterson v. Hague*, 51 Idaho 175, 4 P.2d 350 (1931); *In re Houts*, 7 Wash. App. 476, 499 P.2d 1276 (1972). It should be apparent that adjudications cannot be effectively reviewed if based upon stipulations rather than upon evidence. This, based upon the reasoning of the cited authorities, is at least part of the reason why a guardian ad litem may not waive substantive rights in the cases of incompetent or mentally deficient persons, for to do so would prevent effective judicial review. We hold that the finding based upon the stipulation was void.

As we have earlier noted, these proceedings were initiated upon the ground that the parents, because of their mental deficiencies, were unable to discharge their parental responsibilities and that such condition, in reasonable likelihood, would continue for a long and indefinite period of time. That ground was abandoned and the stipulation was entered into. The record supports the inference that there existed a desire to

avoid making a finding that the parents were incompetent or mentally deficient, for this, especially in the case of Shiela, might indicate that she is incapable of exercising her will in defense of her own right of privacy. The record shows without contradiction that, sometime, apparently between the time the petition was filed and before the adjudication hearing, the director of the M-CSSU assisted in the processing of legal instruments executed by the allegedly mentally deficient parents to authorize Shiela to have an abortion and for Shiela to be sterilized. The abortion did take place. The director testified that the sterilization did not. However, there is other evidence in the record that it may have taken place. At what time and on whose initiative does not appear. The director testified that Shiela understood what she was signing.

We have searched the statutes to determine whether any welfare agency in Nebraska is authorized to engage in such activities. We find none. The Supreme Court of the United States has held that a woman does have a constitutional right to an abortion. It would seem to follow that a woman also has a concomitant right not to have the above-described procedures performed. See the opinion of Mr. Justice Douglas in *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), and the several concurring opinions in that case.

It is plain from the wording of the statute that if parental rights are terminated under subsection (6) of § 43-209 because reasonable efforts have failed to correct the condition, the efforts, or in this case the implementation of the "agreements," must be directed to correcting the condition leading to adjudication in the first place, i.e., in this instance, a finding that the children suffered from a mental condition which required parental care which the parents refused or neglected to give.

The record, however, does tend to support two con-

clusions: (1) That the children may have been malnourished; and (2) That their slow development in other areas was because the parents may not have provided the necessary environment to develop them at a normal rate in the intellectual and social areas. The adjudication was not based on those grounds, as would be required by statute. The plans were not designed to remedy the conditions determined by the adjudication. Two of the social workers testified that little instruction or encouragement could be given to the parents to provide the necessary stimulation when the children were not present in the home. We hold that the trial court erred in determining that the mental deficiency of the parents was not relative to the court's determination of whether to terminate parental rights.

We reverse the judgment and remand the cause to the county court with directions to receive evidence to determine whether there should be an adjudication of neglect and whether parental rights should be terminated under subsection (5) of § 43-209, and receive such other evidence as it may determine is necessary and relevant, especially as to conditions as they exist at the present time. Leave is granted to amend pleadings as may be required in the judgment of the county court. The court should also determine whether, pending final determination of the cause, greater visitation rights under conditions more convenient to the parents should be granted.

We urge the county court to give reasonable priority to this matter.

REVERSED AND REMANDED WITH DIRECTIONS.

BRODKEY, J., concurs in result.

JEFFREY A. OGLE AND JOAN KAY OGLE, HUSBAND AND WIFE, APPELLEES, V. LINCOLN REAL ESTATE, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS CENTURY 21-LINCOLN REAL ESTATE, INC., ET AL., APPELLANTS.

310 N.W.2d 513

Filed September 18, 1981. No. 43379.

Equity: Jurisdiction. Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required, and thus avoid unnecessary litigation.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Watkins, Osborne, Scott & Keist for appellant Lincoln Real Estate, Inc.

Terry K. Barber of Johnston, Grossman, Johnston, Barber & Wherry for appellants Schwaninger.

C. Russell Mattson of Mattson, Ricketts, Davies, Stewart, Calkins & Buxbury for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and RICHLING, District Judge.

RICHLING, District Judge.

This is a suit in equity by Jeffrey A. Ogle and Joan Kay Ogle, husband and wife, against Lincoln Real Estate, Inc., a Nebraska corporation, a licensed real estate broker with its principal place of business in Lincoln, Nebraska; Henry W. Hart, a salesman employee of said company; and Edgar L. Schwaninger and Marilyn M. Schwaninger, husband and wife, owners of certain real estate which had been platted and divided into lots for the purpose of sale.

The action sought to cancel the conveyance of real estate and prayed for judgment against the defendants,

and each of them, for the amount of the purchase price paid by the Ogles for a certain lot, and for damages sustained through conduct of the defendants, together with interest and costs.

Trial was had. The trial court found that it had jurisdiction of the subject matter and the parties, and retained jurisdiction and entered judgment for the plaintiffs and against all of the defendants.

The defendants Schwaninger appealed and the defendants Lincoln Real Estate, Inc., and Henry W. Hart filed a separate appeal. We affirm the judgment of the District Court.

The Schwaningers laid out a development of certain real estate they owned in Lancaster County, Nebraska. They engaged the defendant Lincoln Real Estate, Inc., to sell lots in the development. The defendant Hart was employed as a salesman for Lincoln Real Estate, Inc.

The Ogles, in response to advertising done by the defendants, contacted Lincoln Real Estate, Inc., and Hart for the purpose of purchasing a lot on which they could erect a dwelling. Hart, with Edgar Schwaninger present, showed the Ogles the development and pointed out certain lots. Relying upon the representations made by the defendants, the Ogles purchased a lot. They paid the defendants the purchase price and received a deed. They then proceeded with their plans to erect a dwelling thereon. This included the drilling for a well, starting to construct an individual sewer system, obtaining a building permit, and applying for electric power and telephone service.

After some work had been accomplished, but before the dwelling was placed on the land, the Ogles were advised that they were proceeding on a lot other than the one which had been conveyed to them by the Schwaningers. The Ogles contend that the lot for which they received a deed was not the real estate which was represented to them as the real estate which they were purchasing, and that the lot which

was actually conveyed was not fit for erecting a dwelling thereon; that the Ogles had advised the defendants that their purpose in purchasing a lot was to build a dwelling thereon. The Ogles contend that the representations were falsely and recklessly made and that the Ogles relied on the truth of said representations, to their damage.

The trial court found "by clear and convincing evidence the plaintiffs have proved that they were sold by defendants what in reality was Lot 6 . . . but they were given a Deed by defendants to Lot 5 . . . ." The trial court further found that the defendants had recklessly misrepresented to the plaintiffs the location of the real estate in question, resulting in fraudulent conduct by the defendants, and that the plaintiffs relied on the misrepresentation. It was the further finding of the trial court that consequential expenses were incurred by the plaintiffs as a result of the conduct of the defendants.

The trial court granted judgment against the defendants, and each of them, for the amount of the purchase price paid by the plaintiffs to the defendants, and for such consequential expenses as the court found were incurred as a result of the conduct of the defendants, together with interest and costs. The judgment further provided that the plaintiffs should execute and deliver to the clerk of the court a quitclaim deed conveying Lot 5 to Edgar L. Schwaninger and Marilyn M. Schwaninger, husband and wife, as joint tenants with rights of survivorship, the same to be delivered by such clerk to the grantees therein upon payment of the judgment, costs, and interest as provided in said judgment.

The defendants contend that the trial court erred in finding reckless misrepresentation and fraud when the same was not sustained by sufficient evidence.

This was brought as a suit in equity. A money judgment was rendered therein. An appeal was taken to this court. This court retries the issues presented

to the court below upon the evidence presented in the bill of exceptions. Neb. Rev. Stat. § 25-1925 (Reissue 1979) provides: "In all appeals from the district court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

This court has held in *Russo v. Williams*, 160 Neb. 564, 567-68, 71 N.W.2d 131, 136 (1955): "That rule is, however, subject: '* * * to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.'" See, also, *O'Brien v. Fricke*, 148 Neb. 369, 27 N.W.2d 403 (1947); *Krelle v. Bowen*, 128 Neb. 418, 259 N.W. 48 (1935); *Chitwood Packing Co. v. Warner*, 138 Neb. 800, 295 N.W. 882 (1941); *Donahoo v. Home of the Good Shepherd of Omaha, Inc.*, 193 Neb. 586, 228 N.W.2d 287 (1975). In the case at bar, the court not only had the opportunity to observe the witnesses and their manner of testifying but also, upon the stipulation of the parties, the trial court made a personal inspection of the subject premises.

Further, in *Sechovec v. Harms*, 187 Neb. 70, 72, 187 N.W.2d 296, 297 (1971), this court held: "[W]here a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and

involved in the case and ordinarily will grant such relief, legal or equitable, as may be required and thus avoid unnecessary litigation." See, also, *Muff v. Mahloch Farms Co., Inc.*, 184 Neb. 286, 167 N.W.2d 73 (1969); *Ready Sand & Gravel Co. v. Cornett*, 184 Neb. 726, 171 N.W.2d 775 (1969).

The judgment of the District Court should be, and hereby is, affirmed.

AFFIRMED.

DONNA M. WIBLE, APPELLEE, V.
JERRY C. WIBLE, APPELLANT.

310 N.W.2d 515

Filed September 18, 1981. No. 43780.

1. **Child Custody.** The test for determining custody, which has been reiterated by this court many times, is the best interests of the child.
2. ____ In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
3. ____ Above all other considerations in determining the question of who should have custody of a minor child upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the child.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed and remanded.

Michael N. Schirber of Schirber Law Office, P.C., for appellant.

Robert A. Skochdopole and Daniel P. Chesire of Kennedy, Holland, DeLacy & Svoboda for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and RICHLING, District Judge.

RICHLING, District Judge.

This is an action for dissolution of marriage. The parties were married on December 28, 1970. One child,

Brandt Cameron, was born to this union on June 23, 1972. The parties were divorced in Johnson County, Kansas, on March 29, 1976. They were remarried on June 12, 1976. Later, the husband was assigned military duty as an Air Force physician at Offutt Air Force Base in Sarpy County, Nebraska. The parties took up residence in Sarpy County, Nebraska. Another child, Brandi Elise, was born to this union on August 15, 1977. The parties and the two children lived together until their separation in late 1979.

On November 16, 1979, Donna Marie Wible, the petitioner and appellee herein, filed her petition for dissolution of the marriage in the District Court of Sarpy County, Nebraska. On November 16, 1979, the district judge signed a temporary restraining order and an ex parte order granting temporary custody of the two minor children to the appellee. On November 26, 1979, Jerry Craig Wible, the respondent and appellant herein, filed his motion, with supporting affidavit, moving the court for an order awarding him the temporary care, custody, and control of the minor children. The record reflects that on November 30, 1979, the parties appeared by counsel, but not personally. The judge's docket entry recites: "Counsel stated that matters have been settled, all but custody issue, which is set for hearing January 8, 1980, at 1:30 p.m. Counsel to prepare Order and submit it to the Court." On December 6, 1979, a temporary order was signed and entered which provided that the temporary restraining order and temporary custody order entered on November 16, 1979, shall remain in full force and effect and that hearing as to the temporary custody was set for January 8, 1980. It made provision for temporary support and maintenance to be paid by the appellant to the appellee. The docket entry of January 2, 1980, showed that the trial was reset to February 6, 1980.

The docket entry of February 6, 1980, shows as follows: "This cause came on and the parties appeared

with counsel. Trial was had. The Court finds that the marriage is irretrievably broken and is hereby dissolved. The parties have entered into a Property, Temporary child custody, child support, alimony and division of property agreement. The matter as to the permanent custody is set on or before August 4, 1980. Counsel to submit a proper decree incorporating the agreement reached between the parties."

The bill of exceptions discloses that the matter came on for hearing on February 6, 1980, at 4:40 p.m. The parties appeared personally and with counsel. The only evidence offered or received was the testimony of the appellee. She recited a barebones testimony combining fact and opinion sufficient to permit the court's dissolution of the marriage. The appellee was asked by counsel if the parties had reached an agreement as to the distribution of the assets. She replied, "I believe so." No inquiry was ever made of appellant concerning any proposed settlement. Counsel then proceeded to advise the court as to the terms and conditions of the agreement of the parties. Appellant's counsel stated: "Parties agree that the Court will enter an order with Court approval placing custody of the two children with the Court, possession in the petitioner, subject to a reasonable visitation rights of the respondent, and will take the issue of permanent custody and possession under advisement until August 4, 1980. Petitioner agrees to immediately make arrangements to seek alcohol counselling from a psychiatrist . . . . And the Court will direct a home study . . . ." No evidence was offered as to the fitness or unfitness of either party to have the care and custody of the children. No evidence was offered as to the needs of the parties or the children or of the appellant's ability to pay.

A "Decree of Dissolution of Marriage" was signed and entered on February 22, 1980. The decree dissolved the marriage, approved the property settlement of the parties, and awarded the appellee alimony in the

amount of $200 per month for a period of 36 months, said payments to terminate upon the death of either party or the remarriage of the appellee. The decree further provided: "Temporary custody of BRANDI ELISE WIBLE and BRANDT CAMERON WIBLE is hereby placed with the District Court of Sarpy County, Nebraska, and possession of said minor children is placed with the Petitioner subject to reasonable and liberal visitation rights on behalf of the Respondent at all reasonable times and places. It is further ordered that the Court will take under advisement the issue of permanent custody and possession which matter is hereby set for hearing on August 4, 1980, at 9:00 a.m., at which time both Petitioner and Respondent shall have the privilege to present evidence on the issue of permanent custody and possession of said minor children."

The decree further ordered a home study conducted by the Sarpy County Child Protective Services, with its report being made to the court and available to counsel.

The decree further ordered the appellee to immediately make arrangements for and seek alcoholic abuse counseling from a medically certified psychiatrist, said psychiatrist to submit a report to the court which would be made available for examination by counsel.

Although the decree provided for custody of the children in the court and that hearing would be had on permanent custody on August 4, 1980, the decree made provision for the payment of child support in the amount of $300 per month per child, and stated: "Said payments are to continue until said minor children respectfully [sic] attain their age of majority, marry, die, enter the armed services of the United States, or otherwise are emancipated or subject to further Order of the Court."

On July 24, 1980, the following docket entry was made by the court: "This cause came on and further

hearing set August 26, 1980, at 9:30 A.M. Entry to counsel."

The record discloses that on August 26, 1980, counsel for both parties met with the court in chambers. The court advised counsel for appellant that counsel for appellee wished to make a motion in limine. Whereupon, counsel for the appellee stated: "[T]he petitioner moving the Court in limine to make a pre-hearing ruling limiting the evidence to be heard on the question of fitness of either party for custody of children from the date of February 6, 1980, the date of the decree of dissolution of marriage, to present date. And in support thereof shows to the Court on February 6, 1980, all parties appeared for trial. That at that time there was an agreement made between the parties and accomodation [sic], if you will, concerning custody of children; the whole matter before the Court, that is it involved the child support, property settlement and the alimony. All of those were agreed upon by the parties.

"The Court was fully informed of the issues before the parties, and both parties knew the circumstances of the marriage at the time of the decree. . . ."

The court then inquired of counsel for the appellant if he had any objection to the motion. In response, counsel for the appellant stated: "Yes, the respondent does oppose that motion. Rather than sit here and give the distorted, self-serving rendition of what happened on February 6th, I have asked the court reporter to just mark the Transcript of Proceedings from that date; would certainly speak for itself. . . ." Whereupon, the court sustained appellee's motion in limine.

The matter proceeded to hearing. However, rather than the appellee proceeding with her evidence, the court required the appellant to proceed, thus placing on him the burden of proof. The appellant had subpoenaed and available nine witnesses. The first witness was called. Because of objections and the court's ruling, not only was little evidence elicited but the appellant

was prevented from making an offer of proof because of the sustained motion in limine.

Even though the appellant was limited because of the court's ruling on the motion in limine, the record discloses as follows. Not long after the parties had separated, the appellee met one Captain Richard Marmon in "about the middle of November." On November 16, 1979, the appellee filed her petition for dissolution of the marriage, together with other matters hereinbefore set forth. Hearing was had and a decree of dissolution signed on February 6, 1980. The appellee was granted the right of possession of the family residence so as to provide a home for herself and the two minor children until the house was sold as provided for in the decree. However, the appellee withdrew the minor 7-year-old son from the Bellevue school system, and on March 5 she and the two minor children moved in with Captain Marmon in a house newly purchased by him in Papillion, Nebraska.

The appellee testified, upon questioning, "We had a relationship just as we have now. . . . Just as if we were married." The appellee and the two minor children continued to live with Captain Marmon in his house in Papillion until the appellee and Captain Marmon were married 2 days after the divorce became final, to wit, on August 8, 1980.

At neither hearing was any evidence offered as to the needs of appellee and the minor children, and very minimal evidence of the appellant's ability to pay. The only evidence of the appellant's ability to pay was that at the time the order for child support was entered he had left the military service and had just started a medical practice in a small town; that he had to borrow a large sum of money to get started and had nothing but conjecture as to what his earning capacity would be in the future. The record contains not one iota of evidence as to the appellant's fitness or unfitness to have custody of the minor children. Because of the court's sustaining of the motion in limine,

very limited evidence was offered as to the appellee's fitness or unfitness. Upon trial de novo review by this court, the evidence offered as to the appellee's fitness and the best interests of the minor children is less than minimal.

On September 26, 1980, an order was signed and entered which provided that "custody of the minor children BRANDI ELISE WIBLE, born August 15, 1977 and BRANDT CAMERON WIBLE, born June 23, 1972, is hereby permanently awarded to the Petitioner, Donna Marie Marmon, formerly known as Donna Marie Wible . . . ." The order further required the appellant to pay to the appellee child support in the sum of $250 per month per child for 12 months, beginning September 1, 1980; thereafter the child support was increased to $300 per month per child for 12 months and thereafter to $400 per month per child.

Motion for new trial was overruled and appeal taken to this court.

"An appeal in a dissolution of marriage action is reviewed de novo by this court.

"Where the issue of child custody is involved, both the mother and father have an equal right to the custody of their children. The test for determining custody is the best interests of the child.

"In determining which parent shall be awarded custody of the children, the court shall not give preference to either parent based on the sex of the parent." *Burnham v. Burnham*, 208 Neb. 498, 304 N.W.2d 58 (1981) (syllabi of the court).

"The test for determining custody, which has been reiterated by this court many times, is the best interests of the child." *Theye v. Theye*, 200 Neb. 206, 207, 263 N.W.2d 92, 94 (1978).

There was no evidentiary hearing at the time of the entry of the decree. The only evidence offered was the bare showing in support of the request for dissolution of the marriage. There was no evidence as to the best interests of the children. Custody of the

children was taken in the court upon the recommendation of both parties through their counsel. The custody issue was set for hearing at a later date. Both parties recognized that the appellee had such an alcohol abuse problem that she should be required to seek alcohol abuse counseling from a licensed physician, a psychiatrist, who would submit a report to the court setting forth his diagnosis and the course of counseling prescribed for the appellee, as well as the appellee's response to said counseling. At the hearing as to custody, however, this psychiatrist did not appear. Rather, a psychiatrist hired by the appellee qualified himself to testify and expressed an opinion as to custody.

When one reads the entire record in this case, one must conclude that this court, in attempting to give paramount consideration to the best interests and welfare of the children, is foreclosed from so doing because of the lack of evidence in the record. This lack of evidence in large measure is due to the ruling of the trial court in sustaining the motion in limine and in otherwise excluding proffered evidence.

This court further stated in *Moninger v. Moninger*, 202 Neb. 494, 497-98, 276 N.W.2d 100, 103 (1979): "The criteria the trial court should use in determining the custody of the minor children has been stated so often that it barely needs repeating; however, one of the best statements, which is well recognized by our courts, is found in the case of Christensen v. Christensen, 191 Neb. 355, 215 N.W.2d 111: 'In determining the question of who should have the care and custody of children upon the dissolution of a marriage, "the paramount consideration is the best interests and welfare of the children." Broadstone v. Broadstone, 190 Neb. 299, 207 N.W.2d 682. See, also, Lanz v. Lanz, 189 Neb. 578, 203 N.W.2d 761; Section 42-364, R.S. Supp., 1972. The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the par-

ticular circumstances of each individual case. The general considerations of the moral fitness of the parents, of respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider. In evaluating the general concept of the best interests and welfare of the children it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parents at the trial.'"

Even taking into consideration the fact that the trial judge saw and observed the witnesses, a review of the entire record in this case compels one to conclude that the trial court was guilty of a clear abuse of discretion. Also, the order of the trial court was clearly against the weight of what evidence there is in the record.

"Above all other considerations in determining the question of who should have custody of a minor child upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the child." *Meysenburg v. Meysenburg*, 208 Neb. 456, 457, 303 N.W.2d 783, 784 (1981).

This court has also held on many occasions that the decision on the amount to be awarded as child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion. Again, in this case, there is no evidence as to the needs of the children and only conjecture, rather than facts, as to the appellant's ability to pay at the time of the entry of the order and in the future.

A review de novo of the record compels one to conclude that the court was in error in sustaining the motion in limine. A motion in limine is not a proper

procedure in a dissolution proceeding. However, in view of the ruling of this court, time and space shall not be taken for a full discussion of that matter. The court was in error in limiting the evidence as to the fitness of the parties and the best interests of the minor children.

From a review of the record, we conclude that the court abused its discretion and that a proper determination cannot be made for the best interests of the children. The trial court's abuse of discretion and error deprived the appellant of a fair trial.

The judgment of the trial court should be, and hereby is, reversed and the case is remanded for a full evidentiary hearing on the questions of custody and support of the minor children.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PAUL M. CONLEY, RESPONDENT.

310 N.W.2d 520

Filed September 18, 1981. No. 44436.

Original action.

Judgment of reprimand.

On motion for the court.

PER CURIAM.

The respondent, Paul M. Conley, has filed with this court a conditional admission of guilt of the formal charges filed against him by the Counsel for Discipline of the Nebraska State Bar Association.

Respondent is charged with the violation of Canon 6, DR 6-101(A)(3), and Canon 9, DR 9-102(A)(1) and (2) and DR 9-102(B)(4), and with a violation of his license to practice law as provided in Neb. Rev. Stat. § 7-104 (Reissue 1977).

While representing a claimant in a personal injury action, the respondent recovered an award in the amount of $3,500 from the State Farm Mutual Automobile Insurance Company. Respondent was issued a check draft for $3,500 on September 24, 1980. On September 29, 1980, respondent deposited the check draft in his business account. Early in October respondent notified claimant that he had received the settlement funds and would deposit them into his trust account with final dispersal to be made on October 20, 1980. Arrangements were also made for the purchase of a Certificate of Deposit in the amount of $850 for placement in a conservatorship. On October 20, 1980, respondent failed to disperse the assets of the settlement. On November 16, 1980, respondent issued checks on his business account to claimant, claimant's wife, and claimant's daughter as a final disbursement of the settlement funds. The check which was payable to claimant was returned unpaid by reason of insufficient funds on November 21, 1980. The check cleared respondent's account on November 24, 1980. On January 2, 1981, the Certificate of Deposit was finally purchased for the conservatorship.

The respondent, having failed to use a trust account for client's funds and having failed to properly transmit client's funds to the client, is guilty of unprofessional conduct and is hereby publicly reprimanded for conduct violative of the Canons of Ethics and of his oath as a member of the bar of this court.

JUDGMENT OF REPRIMAND.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1981

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL M. STEWART, APPELLANT.

310 N.W.2d 706

Filed October 9, 1981. No. 43802.

Witnesses. When a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and Marilyn M. Hutchinson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

The defendant appeals from a sentence of 4 to 6 years' imprisonment for assault in the first degree.

The record shows that on February 23, 1980, the defendant and a female companion were waiting for the elevator in the Howard Johnson Motel in Omaha, Nebraska. Stewart Peters, the victim, and a group of his acquaintances were in the elevator when it reached the first floor where the defendant and his companion were waiting. The defendant testified that, when the

elevator door opened and Peters and his party began getting off, one of the men in the party made an obscene remark to the defendant's companion. No one in the victim's party could recall hearing the remark, and the man whom the defendant identified as the speaker, Tom Dolton, denied making an obscene remark but testified that he simply asked the defendant's companion if she needed some assistance with packages she was carrying.

Following whatever remark was made, the defendant, with rough language, told Mr. Dolton and the rest of the party to get off the elevator. There was testimony that some words were exchanged between Dolton and the defendant. The defendant and Royce Gustafson, a member of the Dolton-Peters party, testified that they heard Dolton threaten the defendant with a bottle, and that the defendant threatened to cut Dolton's heart out. At this point, the victim, Stewart Peters, became involved as he got off the elevator.

Peters testified that when he came off the elevator the defendant was standing in the hallway with his hands raised in a sort of martial arts stance, and Peters said, "'What are we having, a hung-kung-fuey show,' or something to that nature." The defendant then lunged at Peters and Peters struck the defendant with his right fist and may have pushed him back with his left hand. The defendant then stabbed Peters in the left forearm, inflicting a serious injury. Peters and the rest of his party then went to the lobby for assistance. Later the police arrested the defendant at the motel.

At the trial, the prosecuting attorney, over objection, was allowed to ask the defendant on cross-examination whether the defendant had had a fistfight with his girl friend earlier on the day of the assault. When the defendant denied this, the State on rebuttal was allowed, over objection, to present testimony that the defendant had struck a woman companion on two occasions on the same day as the assault. The principal

assignment of error relates to the admission in evidence of this testimony.

Neb. Rev. Stat. § 27-404(2) (Reissue 1979) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

At the trial, the evidence that the defendant had struck his girl friend was offered to rebut the defendant's denial that he had been in a fistfight. On appeal, the State argues that the testimony was admissible to prove intent.

The evidence that the defendant had struck his girl friend earlier that day was not admissible for impeachment purposes. It related to a collateral issue and was not proper rebuttal evidence. In *Latham v. State*, 152 Neb. 113, 117, 40 N.W.2d 522, 525 (1949), we said: "When a witness is cross-examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party putting the question." See, also, *Griffith v. State*, 157 Neb. 448, 59 N.W.2d 701 (1953); *Swogger v. State*, 116 Neb. 563, 218 N.W. 416 (1928); *Vanderpool v. State*, 115 Neb. 94, 211 N.W. 605 (1926).

The evidence was not admissible as proof of intent because the act in question, the stabbing of Peters, was not equivocal in nature and criminal or honest according to the intent with which it was done. The evidence was not admissible to "disclose the mastering purpose of the alleged criminal act." See *State v. Ray*, 191 Neb. 702, 217 N.W.2d 176 (1974). The evidence of the earlier assault did not involve or explain the circumstances of the crime charged and was not an integral part of an overall occurrence or transaction.

The admission of the testimony concerning the earlier assault was erroneous and prejudicial and requires that the judgment be reversed.

The judgment of the District Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V.
RODNEY D. PORTER, APPELLANT.

310 N.W.2d 926

Filed October 9, 1981. No. 43906.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed as modified.

James W. Symonds of Cronin, Hannon & Symonds for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Defendant was sentenced to a term of probation for a November 5, 1978, burglary. The statute covering this crime in effect at the time was Neb. Rev. Stat. § 28-532 (Reissue 1975), which provided for a possible sentence of from 1 to 10 years' imprisonment in the Nebraska Penal and Correctional Complex. Following an appropriate hearing his probation was revoked and he was thereafter sentenced to a term of not less than 3 nor more than 10 years' incarceration in the penal complex. He has appealed from that sentence, assigning as errors that the trial court considered certain confidential letters addressed to the trial judge, contrary to Neb. Rev. Stat. § 29-2261(3) (Reissue 1979); that the sentence was excessive; and that the court failed to give defendant credit for 34 days in jail served prior to the sentencing. The maximum sentence

imposed upon the defendant was the maximum permitted by statute, and under the rule in *State v. Rathbun*, 205 Neb. 329, 287 N.W.2d 445 (1980), credit for jail time must be given. The State concedes this point. The defendant agrees that the evidence was sufficient to revoke his probation and he does not contest this finding by the trial court, and we agree that the record supports such conclusion.

The letters complained of were from the mother and grandmother of the defendant's girl friend, reciting several incidents of cruel, vicious, and perverted acts of violence directed against the latter by the defendant. At the time of sentencing the district judge stated that he would consider those letters only as an indication that the defendant had not done much to correct the situation that was "evaluated as existing" at the time of the original sentence of probation. The defendant's counsel was allowed to examine and read these letters prior to the final sentencing and, although he had every opportunity to do so, neither he nor the defendant made any effort to refute the facts alleged in those letters. The only objection made was that the letters were hearsay and that they were not authorized by statute as a type of information proper for a presentence investigation.

By the very nature of a presentence investigation report, it is necessary to rely to a great extent upon hearsay information. Furthermore, § 29-2261(3) provides in part that a presentence investigation and report shall include "any other matters that the probation officer deems relevant or the court directs to be included." We have held on numerous occasions that before pronouncing sentence a trial judge has broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. We have gone so far as to say that the latitude allowed a sentencing judge in such instances is almost without limitation as long as it is

relevant to the issue. *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981); *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969). There is no merit to this assignment of error.

As to the claimed excessiveness of sentence imposed, it is axiomatic that absent an abuse of discretion we will not disturb the action of the trial court in imposing a sentence within the statutory limits. *State v. Bosak*, 207 Neb. 693, 300 N.W.2d 201 (1981).

Defendant's record commenced in 1973, at which time he was 13 years of age. He was sent to Boys Town for mail theft, from which institution he ran away on four different occasions. He was also committed to the Youth Development Center from which he escaped, stole an automobile, and was convicted and sentenced to 4 months in jail. He was convicted of burglary and served 3 weeks in jail. He was again committed to the Youth Development Center and was eventually discharged. In 1977 he was convicted of auto theft and sentenced to 1 year in the Nebraska Penal and Correctional Complex. There was no abuse of discretion by the trial court in the imposition of the sentence in this case.

The judgment and sentence of the District Court is affirmed, except that defendant shall be given credit for 34 days' jail time previously served.

AFFIRMED AS MODIFIED.

EDWARD DEAN BETZER, APPELLEE, V.
SUSAN GAIL BETZER, APPELLANT.

310 N.W.2d 707

Filed October 9, 1981. No. 44010.

Appeal from the District Court for Douglas County: SAMUEL J. CANIGLIA, Judge. Affirmed.

Thomas J. Young for appellant.

Whitmore, Gilroy & Stortz, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

The respondent, Susan Betzer Catania, has appealed from an order of the District Court modifying a marriage dissolution decree of March 29, 1979. The modified decree took the custody of the parties' 9-year-old daughter Jennifer from the mother and placed it in Edward Betzer, the father and petitioner. The respondent contends that there were insufficient circumstances to warrant a change of custody, that the father was not a fit person to have the custody and control of the child, and that the change of custody was not in the best interests of Jennifer. We affirm.

From the date of the original decree until the hearing on the modification in August and October of 1980, Jennifer spent the summers with her father and the rest of the time with her mother. During that period of time, Susan lived with three different men, becoming romantically involved with two of them, and moved from Omaha to Lisle, Illinois, to Statesboro, Georgia, to Omaha, and finally to Nederland, Colorado. In the meantime, Edward remained in Omaha where he continued to work for Western Electric in a position which he had held for 11 years. During a portion of that time up to the time of the last hearing, his fiancee resided with him in the family home.

As the trial judge observed, neither parent "would

win a moral prize." However, he also pointed out that Susan had moved to six different places in a little over a year and a half, and he obviously concluded that the father offered a more stable environment, suitable to the best interests of the child. We agree. The determination of the trial judge with respect to changing custody of a child ordinarily will not be disturbed unless there has been a clear abuse of discretion or the decision is against the weight of the evidence. *Soukup v. Soukup*, 208 Neb. 672, 305 N.W.2d 372 (1981).

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD ROBINSON, APPELLANT.

311 N.W.2d 7

Filed October 9, 1981. No. 44064.

Criminal Defendants: Appearance Bonds. A defendant who is released following imposition of sentence to reappear upon further order of the court has been "released from custody under . . . a conditioned release" within the meaning of Neb. Rev. Stat. § 29-908 (Reissue 1979).

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

James T. Hansen and Jonathan Pratter for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Defendant was prosecuted and convicted of a violation of Neb. Rev. Stat. § 29-908 (Reissue 1979), failing to appear before the court after having been "released from custody under bail, recognizance, or a conditioned

release." He was sentenced to a term of imprisonment of 18 months to 2 years. Defendant has appealed, contending in substance that the State failed to establish an essential element of the crime, viz, that there was a valid recognizance in effect at the time of his failure to appear. We determine that defendant's appeal is wholly without merit.

The defendant was charged with unlawfully disposing of a dead body and, on July 20, 1977, was released under a properly executed $5,000 recognizance. Following his conviction and sentence for a term of 18 months to 2 years, a 30-day stay of execution was granted to permit the defendant to perfect his appeal to the Supreme Court. In addition, the trial court continued the original $5,000 recognizance. On October 15, 1979, a mandate from this court affirmed the judgment and sentence, and the defendant was ordered to surrender himself on November 2, 1979, which he failed to do. His bond was ordered forfeited and he was finally arrested and returned to the Scotts Bluff District Court on September 2, 1980.

By some sort of convoluted reasoning, the defendant claims that the 30-day stay of execution of the sentence had expired long before his ordered appearance date and the $5,000 recognizance executed before trial was no longer in effect; therefore, there was no binding bail agreement in force which he violated.

The recognizance executed by the defendant before trial was not limited to appearing for trial. It required the defendant to appear on August 12, 1977, and from time to time thereafter as ordered by the court. The district judge, following sentencing on the original felony, not only suspended execution of the sentence for 30 days as requested by the defendant but also released the defendant on the "present filed bond." At the time of his release, the defendant was also told by the court that "if this matter were to be affirmed by the Nebraska Supreme Court on appeal and you did fail to appear for execution of this sentence, it would create a separate

crime . . . ."

No question remains but that the defendant was "released from custody under bail, recognizance, or a conditioned release" and failed to appear and surrender himself as required by § 29-908.

The judgment and sentence of the District Court was correct and is affirmed.

AFFIRMED.

DAWN K. NOVAK, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEVEN M. NOVAK, DECEASED, APPELLANT, V. GORDON L. NELSEN ET AL., APPELLEES.

311 N.W.2d 8

Filed October 9, 1981. No. 44398.

1. **Jury Verdicts: Motions for New Trial: Time.** After a verdict by a jury a motion for new trial must be made within 10 days after the verdict was rendered and accepted by the court, not from the date judgment was entered on the verdict.
2. **Motions for New Trial: Appeal and Error: Time.** In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the judgment or decree or the making of the final order.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Appeal dismissed.

Gast & Kielty for appellant.

Alan L. Plessman for appellees.

On motion for the court.

PER CURIAM.

The defendant Byington has filed a motion to dismiss the appeal in this automobile accident negligence case. The only issue is when the time for filing a motion for new trial begins to run following the rendition and acceptance of a jury verdict. Because the court has not

directly ruled on the specific issue here, an opinion is deemed appropriate.

At the conclusion of the evidence the trial court sustained a motion for directed verdict as to defendant Nelsen, and on April 16, 1981, the jury returned its verdict in favor of the defendant Byington. On the same date the trial judge noted on the trial docket that the verdict was accepted. The proceedings had on April 16, 1981, were spread upon the journal of the court on the following day. On April 20, 1981, the District Court entered judgment on the jury verdict and dismissed the plaintiff's petition. On April 30, 1981, motion for new trial was filed by the plaintiff, which was overruled by the District Court on May 22, 1981. On June 16, 1981, notice of appeal was filed.

Neb. Rev. Stat. § 25-1142 (Reissue 1979) provides in part: "A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court."

Neb. Rev. Stat. § 25-1143 (Reissue 1979) provides in relevant part: "The application for a new trial must be made, within ten days, either within or without the term, after the verdict, report or decision was rendered . . . ." The stated exceptions are not involved here.

We have consistently held that a motion for a new trial filed more than 10 days after a verdict, report, or decision is rendered is a nullity, and that the overruling of such a late motion does not extend the time for filing a notice of appeal. *Pallas v. Dailey*, 169 Neb. 277, 99 N.W. 2d 6 (1959).

After a verdict by a jury a motion for new trial must be made within 10 days after the verdict was rendered and accepted by the court, not from the date judgment was entered on the verdict. See § 25-1143. To the extent *Community Credit Co. v. Gillham*, 191 Neb. 198 at 206, 214 N.W.2d 384 at 390 (1974), is in conflict, it is overruled.

In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the

rendition of the judgment or decree or the making of the final order. See Neb. Rev. Stat. § 25-1912 (Reissue 1979).

In this case the motion for new trial was filed more than 10 days after the verdict of the jury was rendered, accepted, and filed and it was, therefore, a nullity. Judgment on the verdict was entered on April 20, 1981, and notice of appeal was filed on June 16, 1981, more than 30 days thereafter. This court is therefore without jurisdiction. The appeal is dismissed.

APPEAL DISMISSED.

IN RE ESTATE OF GALEN L. NELSEN, DECEASED. DELMER GROETEKE, APPELLANT, V. BEVERLY A. NELSEN, PERSONAL REPRESENTATIVE, APPELLEE.

311 N.W.2d 508

Filed October 23, 1981. No. 43492.

1. **Uniform Commerical Code: Contracts.** Performance of an oral contract for the sale of goods that is capable of apportionment is enforceable only as to that portion that has been either fully or partially performed.
2. **Statute of Frauds: Contracts.** A delivery alone by the seller is insufficient to take an oral contract for the sale of goods of the price of $500 or more out of the statute of frauds. The goods must have been received and accepted before avoidance of the statute of frauds is recognized.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

H. E. Hurt, Jr., and James A. Gallant for appellant.

Nicholas J. Lamme of Yost, Schafersman, Yost, Lamme & Hillis for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal from a District Court judgment en-

tered on a jury verdict in favor of the estate of Galen L. Nelsen. The claimant, Delmer Groeteke, farms near Hooper, Nebraska. The deceased, Galen L. Nelsen, owned and operated Anderson Feed & Seed Co. in Fremont, Nebraska.

Early in the spring of 1977 Delmer Groeteke contacted Galen L. Nelsen about the possibility of Anderson Feed & Seed Co. purchasing Groeteke's 1976 soybean crop. After performing germination tests on the beans, Groeteke and Nelsen entered into an oral agreement for the purchase of the soybeans. The exact quantity of soybeans purchased was disputed. Delmer Groeteke claims the oral contract was for his entire crop, approximately 2,500 bushels. The estate claims the oral contract was for 1,762.68 bushels of soybeans, the amount which was actually delivered and received. The price, which was $10.40 per bushel, is not in dispute.

On April 12, 1977, Delmer Groeteke delivered the first load of soybeans, 212 bushels, to Anderson Feed & Seed Co. Since he was busy with his farming operations, Groeteke left his truck with Nelsen so that Nelsen could haul the remaining beans. Between April 15, 1977, and May 18, 1977, Nelsen and his son hauled eight loads of soybeans from the Groeteke farm. This brought the total amount of soybeans actually received by Anderson Feed & Seed Co. to 1,762.68 bushels. Groeteke was paid for the nine loads of soybeans in three checks dated May 9, 1977, May 24, 1977, and June 4, 1977, totaling $18,331.77. No beans were hauled after May 18, 1977.

The price of soybeans dropped during the summer, and on August 1, 1977, Groeteke sold 260.67 bushels of the remaining beans to the Hooper co-op for $5.74 per bushel. On March 17, 1978, Groeteke sold the remaining 500 bushels to the Hooper co-op for $6.31 per bushel. Action was commenced on August 9, 1978, to recover the difference between the price received for the remaining bushels and the contract price. On August

11, 1978, Galen Nelsen was killed in an automobile accident. Groeteke filed a claim against Nelsen's estate in the county court of Dodge County, Nebraska, on June 4, 1979. The claim was disallowed by the personal representative. Groeteke's petition for allowance of the claim in the county court was also disallowed. An appeal was taken to the District Court for Dodge County, Nebraska. The issue was tried to a jury and a verdict was rendered in favor of the estate, from which the claimant appealed. We affirm the trial court's judgment on other grounds.

The trial court should have sustained the estate's motion for a directed verdict. The statute of frauds was properly raised as a defense to the present action by a general denial. *Benes v. Reed*, 158 Neb. 128, 62 N.W.2d 320 (1954); *Ord v. Benson*, 163 Neb. 367, 79 N.W.2d 713 (1956). The record shows that the statute of frauds was specifically raised in the estate's motion for a directed verdict at the close of the claimant's case. The statute of frauds states: "Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing." Neb. U.C.C. § 2-201(1) (Reissue 1980). The oral contract was for personal property in excess of $500.

The claimant argued that the contract was without the statute of frauds because it falls within Neb. U.C.C. § 2-201(3)(c) (Reissue 1980), which reads: "A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . with respect to goods for which payment has been

made and accepted or which have been received and accepted . . . ."

The contract in question clearly falls within § 2-201(3)(c). The evidence indicates that Galen Nelsen received, accepted, and paid for 1,762.68 bushels of soybeans. However, at no time were the remaining 750 bushels received or accepted by Nelsen. "The language of the statute, and of the official comment, makes it clear that part performance of an oral contract for the sale of goods that is capable of apportionment is enforceable only as to that portion that has been either fully or partially performed." *In re Augustin Bros. Co.*, 460 F. 2d 376, 380 (8th Cir. 1972); *Wilke v. Holdrege Coop. Equity Exchange*, 200 Neb. 803, 265 N.W.2d 672 (1978). To the extent the contract covers goods in excess of 1,762.68 bushels of soybeans, it is unenforceable. A directed verdict was proper under these circumstances since, under the facts, the claimant was not entitled to any relief.

In his assignments of error, Groeteke claims the trial court erred in not giving his jury instruction Nos. 1, 2, and 3, dealing with acceptance and delivery. The statute of frauds is clear on this issue. A delivery alone by the seller is insufficient to take an oral contract for the sale of goods of the price of $500 or more out of the statute. The statute makes it necessary that the goods "have been received and accepted" before avoidance of the statute of frauds is recognized. See, *Del Hayes & Sons, Inc. v. Mitchell*, 304 Minn. 275, 230 N.W.2d 588 (1975). *Benes v. Reed, supra.* The assignment is without merit.

The remaining assignments of error will not be discussed, as they are not determinative of this appeal.

AFFIRMED.

RICHARD P. STRAYER AND ROBERT L. PETTEGREW, APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

311 N.W.2d 510

Filed October 23, 1981. No. 43500.

Contracts: The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of their contract, and should be given great, if not controlling, influence.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

Thomas F. Dowd of Dowd & Fahey Law Offices and Jerome A. Merwald for appellants.

Herbert M. Fitle, City Attorney, and Kent N. Whinnery for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The plaintiffs, Richard P. Strayer and Robert L. Pettegrew, are park caretakers employed by the City of Omaha, Nebraska. They brought this action against the City, the mayor, the Finance Department director, and the Parks and Recreation Department director on behalf of themselves and all other similarly situated current and former employees who had been employed by the City within the preceding 5 years. The plaintiffs alleged they were hourly employees but had not been paid for hours worked in excess of 40 hours per week. The plaintiffs prayed for an accounting of the wages due them, together with interest, costs, and attorney fees.

The answer of the City alleged that the plaintiffs were entitled to wages at the hourly rate for only 40 hours per week and that there was no identity of interest be-

tween the plaintiffs and other members of the class.

The trial court found that the action was not properly brought as a class action and that the plaintiffs were entitled to be paid at the hourly rate on the basis of only 40 hours per week without regard to the hours actually worked. The plaintiffs have appealed.

The plaintiffs are employed as either Park Caretaker I or Park Caretaker II by the defendant City. The collective bargaining agreement provides an "hourly rate" of pay for the classifications which include Park Caretakers I and II. The testimony shows that the hourly rate was determined by multiplying the monthly rate by 12, and then dividing that figure by 2,080 hours. The number of hours, 2,080, was arrived at by multiplying 52 weeks by 40 hours. The plaintiffs contend the formula for determining the hourly rate assumes a 40-hour week.

The caretakers are on call 24 hours a day, but their "workweek" is a 6-day 48-hour week. Twice a month they are paid one half of what is defined in the collective bargaining agreement as their monthly rate of pay.

The plaintiffs contend that caretakers are hourly employees and their basic weekly salary should be the stated hourly rate times 48 hours. They emphasize that vacation, sick, and overtime pay for the caretakers is figured on the basis of the "hourly rate."

Park caretakers who work on their regularly scheduled day off are paid one and one-half times the hourly rate stated in the collective bargaining agreement. Witnesses for the City testified that, as to park caretakers, the stated hourly rate is merely a control number to facilitate figuring overtime, vacation pay, and sick-leave pay. They also testified that the 48-hour "workweek" assigned to park caretakers serves the same type of control function for determining time and attendance records. There was also testimony that, during negotiations in the early 1970s, demands were made by representatives of the park caretakers with regard to paying park caretakers by an hourly, rather than monthly,

rate, but that this demand was rejected.

Park caretakers for the City of Omaha are furnished living quarters by the City in the park where they work. Utilities and telephone service are paid for by the City.

The sections of the current collective bargaining agreement dealing with hours of work (Article XII), overtime (Article XIII), meal periods (Article XIV), and show-up and call-in time (Article XV) all specifically exempt employees who are furnished living quarters on city property from the operation of those articles.

While the labor agreement does provide that "Eight hours of work shall constitute a regular daily work shift. A regular work week consists of five consecutive eight-hour days," it further provides that "The provisions of this Article [XII] shall not apply to employees furnished living quarters on CITY property." We think that these provisions demonstrate that considerations applied to city employees based on a 40-hour workweek do not apply to the plaintiffs.

It is clear from the record that the park caretakers have always been paid on a monthly basis. With one exception the job "postings" since 1969, which appear in the record and are announcements of examinations for persons seeking employment as park caretakers, quote a monthly salary.

"'The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of their contract, and should be given great if not controlling influence, * * *.'" *Stover v. Ed Miller & Sons, Inc.*, 194 Neb. 422, 426-27, 231 N.W.2d 700, 703 (1975).

We think the record as a whole shows that the plaintiffs, as park caretakers, are entitled to be paid only on a monthly basis, and the finding of the trial court was correct.

It is unnecessary to consider the assignments of error concerning whether a class action was appropriate.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILLY R. BILLUPS, APPELLANT.

311 N.W.2d 512

Filed October 23, 1981. No. 43693.

1. **Warrantless Searches: Search and Seizure.** The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it.
2. ____:____. The question of whether a consent to search is voluntarily given is a question of fact.
3. ____:____. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Billy R. Billups (Billups), appeals from a conviction based upon a jury verdict which had found Billups guilty of committing a violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1979), robbery, a Class II felony; a violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1979), using a firearm to commit a felony, a Class III felony; and a violation of Neb. Rev. Stat. § 28-308(1) (Reissue 1979), assault in the first degree, a Class III felony. Billups was sentenced to a term of 15 to 20 years on the robbery charge; 5 to 20 years on the use of a firearm charge, to be served consecutively to the robbery sentence; and 5 to 20 years on the

first degree assault charge, to be served concurrently with the robbery sentence and use of a firearm sentence.

Billups assigns two errors. The first error assigned by Billups is that the trial court erred in refusing to suppress evidence seized at appellant's home while making an alleged unlawful arrest. The second assignment of error claimed by Billups is that the trial court erred in failing to instruct the jury on a lesser-included offense of second degree assault, as requested by Billups. We believe that appellant's claim of error in both instances must be denied and the judgment and sentences affirmed in all respects.

We shall discuss the assignments of error in the order presented by appellant. Before doing so, however, a brief summary of the facts is necessary.

On the morning of March 27, 1980, Gary Cady was working at the Imperial Oil Company gas station in Omaha, Nebraska. At about 8:15 a.m. he noticed two males sitting in a car near the air pump. One of the men, whom Cady later identified as Billups, came into the station and asked for change. Cady indicated to Billups that he did not have any money with him. Billups then began to talk about the old manager who used to help him out. The conversation lasted about 3 or 4 minutes and Billups departed the station. After Cady had pumped gas for a number of cars he went back inside the station to put the money into the safe. At that point Billups entered the station again and headed toward the men's room. He was wearing a "long gray coat with checks on it." He suddenly jumped back and displayed a revolver which he pointed at Cady and ordered him to "step on back here." Cady went into the backroom of the station and was ordered to lie down on the floor and not move. While Cady was lying on his stomach Billups took Cady's billfold and the coin changer and asked him for the keys to the safe. Cady told Billups that he did not have the keys for the bottom safe but did for the top

safe. While Cady was getting up to get the keys out of his coat pocket, Billups proceeded to shoot Cady, once in the shoulder or arm, which knocked him back, and a second time in the chest, right above the heart. Cady fell to the floor, at which time Billups shot him again. At that point Billups fled the station, taking with him $75.10.

Shortly thereafter help arrived and the police were summoned. Before Cady was taken to the hospital he gave a description of Billups to the police. Cady also described the coat which Billups was wearing. It was a long gray coat with checks of black or gray.

At the hospital Cady had one bullet surgically removed from his right shoulder, the other bullets having glanced off of him. The hospital personnel had to dig the bullet out and then sew up the wound. At the hospital Cady identified Billups as the robber from numerous photographs shown him by a police officer. With this information the police went to where Billups lived with his brother, Bernard, and Bernard's wife, Edith.

One of the police officers present at Billups' residence testified at a suppression hearing requested by Billups that when the police arrived at Billups' house they observed two women in front of the house getting into a car. One of the women was Edith Billups, Bernard Billups' wife. She was asked if Billups was at home and she replied that she believed he was. Testimony discloses that at that point Edith Billups turned from the car and proceeded to walk back to the house with the police officers following her. She knocked on the front door and it was opened by Bernard Billups. The officers asked if appellant was home and were told by Bernard Billups that his brother was upstairs sleeping.

The officers then went upstairs and placed Billups under arrest. As the officers were leaving the residence with Billups they noticed a black-and-white tweed-type coat hanging in a hallway just inside the front door.

The police took the coat with them when they took Billups to police headquarters. Cady later identified the coat as that worn by Billups during the robbery and assault.

Bernard Billups denied having given consent but conceded that when he answered the front door his wife, Edith, walked in with the officers right behind her. No one advised the officers to remain out of the house. Based upon the testimony the trial court specifically found that the evidence established that the officers had received consent to enter the house from Mrs. Billups, one of the residents of the house.

With this background we turn now to the assignments of error raised by appellant, the first one being that the trial court erred in refusing to suppress the evidence of the overcoat obtained during the arrest of Billy Billups. Billups' argument is framed in the traditional fourth amendment form. Billups argues that the arrest, having been nonconsensual and without warrant, violated the standards established by the U.S. Supreme Court in *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Appellant then argues that because the arrest was illegal and in violation of Billups' fourth amendment rights, all evidence obtained as a result of the illegal arrest are "the fruits of a poisonous tree" and likewise inadmissible. See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Appellant's position is correct unless the trial court properly found that the entry into the Billups home was consensual. While it is true that mere submission to authority is insufficient to establish consent, see, *Amos v. United States*, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1921), and *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), consent must in each instance be determined from the totality of the circumstances.

While greater expectations of privacy may exist with regard to one's home as opposed to other property, the

issue concerning consent appears to be the same. In *State v. Rathburn*, 195 Neb. 485, 239 N.W.2d 253 (1976), we examined the matter of consent in the context of the fourth amendment to the U.S. Constitution, and said at 489, 239 N.W.2d at 256: "The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it. [Citations omitted.] A question of whether a consent to search is voluntarily given is a question of fact."

Likewise, in *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), the U.S. Supreme Court said in part: "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion."

And in *United States v. Watson*, 423 U.S. 411, 424, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976), the U.S. Supreme Court said: "We are satisfied in addition that the remaining factors relied upon by the Court of Appeals to invalidate Watson's consent are inadequate to demonstrate that, in the totality of the circumstances, Watson's consent was not his own 'essentially free and unconstrained choice' because his 'will ha[d] been overborne and his capacity for self-determination critically impaired.' [Citation omitted.] There was no overt act or threat of force against Watson proved or claimed. There were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment. He had been arrested and was in custody, but his consent was given while on

a public street, not in the confines of the police station. Moreover, the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Similarly, under *Schneckloth*, the absence of proof that Watson knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance."

And, further, in the recent case of *United States v. Mendenhall*, 446 U.S. 544, 555-58, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), the U.S. Supreme Court said: "We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions. It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily.

. . . .

"The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances . . . . The Government's evidence showed that the respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers."

The question, therefore, that we must answer in the instant case is whether there was consent given to the officers to enter the Billups home and make the search. In doing so we must keep in mind the standard of review to be applied in such a case, which is, "The applicable standard of review by this court . . . should be the same as applied in other similar types of cases. The

findings of fact by the District Court will not be set aside on appeal to this court unless they are clearly erroneous. In determining whether the District Court's findings are clearly erroneous, this court takes into consideration the advantage of the District Court in having heard the oral evidence." *State v. Van Ackeren*, 194 Neb. 650, 657, 235 N.W.2d 210, 215 (1975). Furthermore, in *State v. Van Ackeren* at 657-58, 235 N.W.2d at 215, we noted: "When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 . . . ."

We believe an examination of the record supports the trial court's finding that Edith Billups, a co-occupant of the premises, did in fact consent to the officers entering the home. The evidence clearly establishes that at the time the officers arrived Edith Billups was departing the premises and about to enter into her car and drive away. She voluntarily, without threat or coercion, changed her direction and walked back to the house with the officers knowingly following behind her. She knew the officers were looking for Billups and her action in leading the officers back to the house is completely consistent with the officers' testimony that she was taking them back to the house. Upon arriving at the porch she knocked on the door and, when the door was opened, walked into the house with the officers behind her. She made no effort to indicate to the officers that they were not at liberty to continue following her through the door as they had previously followed her from the sidewalk to the door. Moreover, Edith Billups never appeared and testified to the contrary. We are unable to say that the finding of fact by the trial court to the effect that Edith Billups

gave consent was clearly erroneous and must be disregarded. We therefore must conclude that the trial court's finding of consent was correct, and the first assignment of error must be overruled.

We turn then to the second assignment of error raised by appellant to the effect that the trial court erred in not giving a requested instruction on second degree assault as being a lesser-included offense. We believe that the flaw in this argument is due to the fact that appellant is wrong in maintaining that second degree assault is a lesser-included offense of first degree assault. They are two distinct offenses. Section 28-308(1) provides: "A person commits the offense of assault in the first degree if he intentionally or knowingly causes *serious bodily injury* to another person." (Emphasis supplied.) On the other hand, Neb. Rev. Stat. § 28-309(1) (Reissue 1979) defines assault in the second degree: "A person commits the offense of assault in the second degree if he: (a) Intentionally or knowingly causes *bodily injury* to another person with *a dangerous instrument*; or (b) Recklessly causes serious bodily injury to another person with a dangerous instrument." (Emphasis supplied.) First degree assault occurs whenever "serious bodily injury" is present, while second degree assault only involves "bodily injury" if with a dangerous weapon, and "serious bodily injury" if done recklessly with a dangerous weapon. Certainly there is no evidence in this case to support a claim that the shooting by Billups was done recklessly and was anything but intentional. See Neb. Rev. Stat. § 28-109(19) (Reissue 1979). Therefore, unless we are prepared to say that shooting one in the chest above the heart is not the inflicting of a serious bodily injury and that a jury could lawfully find that shooting one in the chest above the heart is only a bodily injury, there was no evidence upon which assault in the second degree could have properly been submitted to the jury. We have frequently held that it is only when a higher crime fully embraces

all of the ingredients of a lesser offense and when the evidence requires it that an instruction on a lesser-included offense must be given on request. See *State v. McClarity*, 180 Neb. 246, 142 N.W.2d 152 (1966). Neb. Rev. Stat. § 28-109(20) (Reissue 1979) defines serious bodily injury to mean "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." The evidence in this case correctly reflected that if the appellant was guilty of anything, he was guilty of intentionally or knowingly causing serious bodily injury to another. While we are not prepared to say, and do not by this decision hold, that every shooting of another is automatically a serious bodily injury, we do believe that shooting one in the chest above the heart in such a manner that the bullet must be dug out and the wound sutured, as disclosed by the evidence, indeed satisfied the statutory definition of "serious bodily injury." To hold anything else would be to totally ignore the obvious. We believe the trial court was correct in only submitting to the jury the issue of first degree assault and refusing to submit to the jury the issue of second degree assault. Having so concluded, the judgment and sentences must be affirmed.

AFFIRMED.

LOUISE E. REDMOND, APPELLANT AND CROSS-APPELLEE, V. JAMES L. REDMOND, APPELLEE AND CROSS-APPELLANT.

311 N.W.2d 517

Filed October 23, 1981. No. 43742.

Property Division: Appeal and Error. This court is not inclined to disturb the division of property made by the trial court in an action for dissolution of marriage unless it is patently unfair on the record.

Appeal from the District Court for Dakota County: BRYCE BARTU, Judge. Affirmed as modified.

Kurt T. Rager and Leamer Law Office for appellant.

Maurice S. Redmond for appellee.

Heard before BOSLAUGH, CLINTON, BRODKEY, and WHITE, JJ., and HOWARD, District Judge.

HOWARD, District Judge.

Petitioner appeals from that portion of a decree in dissolution of her marriage appointing a referee to sell all the personal property and granting her 60 percent of the net proceeds, assigning as error that the requirement of a sale rather than a division in kind is unfair and abusive of discretion, and that she should be awarded a greater proportion of the personal property. Respondent cross-appeals, contending that he is entitled to 50 percent, rather than 40 percent, of the personal property.

The record insufficiently details the personal property and fails to show values. It apparently consists of household furniture, some of which is encumbered, appliances and utensils, a 1978 Ford automobile purchased on an installment sale contract, a promissory note of $5,300 given by respondent to petitioner before the marriage, life insurance policies, and other miscellaneous items.

The trial court also awarded the family home to the petitioner, subject to the mortgage which she was directed to pay, and clothing and personal effects to the parties in possession. The fairness of these awards is not questioned by either party. At the time of the marriage in 1974 the petitioner owned the house, full of furniture, a supermarket, where respondent worked on a salary until he suffered a stroke in 1975, and an automobile which was traded in for the 1978 Ford in question. Since being disabled, respondent has received Social Security and insurance payments, and $18 per week painting signs for a local grocery store. During

the marriage, before his stroke, respondent made payments of $300 per month for child support and alimony from a previous marriage. It appears that respondent has made some payments on the furniture, the automobile, and insurance policies, as well as house payments for "quite a few years." Precision is lacking throughout the evidence. Petitioner acknowledges that respondent is entitled to "something," and respondent argues that he should receive 50 percent, not 40 percent, of the personal property. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. *Tavlin v. Tavlin*, 194 Neb. 98, 230 N.W.2d 108 (1975). We cannot say, on this record, that the division was patently unfair.

The record discloses that very little assistance was given to the trial court by counsel in the task of evaluating the marital estate. The trial court's decision requiring a sale of all personal property can be understood, but we are of the view that, given the nature of the personal property and the encumbrances, the portion of the decree appointing a referee to sell the personal property should be modified to require the referee to itemize the values and determine the encumbrances and report them to the court for further order.

Accordingly, the decree is affirmed in all respects, except that the portion thereof appointing the referee is modified to provide that the referee shall inquire into the nature and values of the various items of personal property and the encumbrances thereon and report the same to the court for further order, which, so far as is practicable, shall divide the property in kind.

AFFIRMED AS MODIFIED.

JESSIE L. AKINS, APPELLANT, V.
HAPPY HOUR, INC., ET AL., APPELLEES.

311 N.W.2d 518

Filed October 23, 1981. No. 43765.

SUPPLEMENTAL OPINION

Appeal from the Nebraska Workmen's Compensation Court. On motion for rehearing. See *ante* p. 236, 306 N.W.2d 914 (1981), for original opinion. Motion for rehearing overruled.

Robert C. Wester of Schirber Law Offices, P.C., for appellant.

Hansen & Engles, P.C., for appellees Happy Hour and Aetna Ins. Co.

Paul L. Douglas, Attorney General, and John R. Thompson for appellee State.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

The present statutes and decisions of this court do not authorize an allowance of attorney's fees in this court under the circumstances present in this case. See *Rexroat v. State*, 143 Neb. 333, 9 N.W.2d 305 (1943).

That portion of the judgment allowing an attorney's fee of $1,000 for services of the employee's attorney in this court is withdrawn.

MCCOWN, J., dissenting.

Neb. Rev. Stat. § 48-125 (Reissue 1978) provides for the allowance of attorney's fees to an employee in workmen's compensation cases. The relevant portion of that statute provides: "In the event the employer files an application for a rehearing before the compensation court en banc from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court sitting en banc may

allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court."

The supplemental opinion of the majority in this case holds that where an employer initiated the appeal from an award of a judge of the compensation court and the final judgment of the Supreme Court on appeal reversed the judgment of the three-judge compensation court and affirmed the amount of the original award, the employee is not entitled to an attorney's fee in either the Workmen's Compensation Court or in this court because the employer was not the appellant in the Supreme Court. That holding fragments the appellate process in workmen's compensation cases and misinterprets the legislative intent.

No one would dispute the fact that the Legislature intended that whenever an employer initiated an appeal, either in the Workmen's Compensation Court or in the Supreme Court, and failed to obtain a reduction in the award appealed from in that court, the employee is entitled to an attorney's fee. There is no reason whatever to divide the appeal process in a workmen's compensation case and treat it as though it involved two separate cases in two different courts, each final and independent of the other. The case at bar is a graphic example of the result of such an interpretation.

In this case the Supreme Court held that the three-judge compensation court erroneously reduced the original award in a case in which the employer initiated the appellate process in the compensation court. On the continuation of the appellate process by the employee the Supreme Court has now affirmed the original award of a judge of the compensation court and that award has become the final judgment in the compensation court as well as in this court. If that final judgment had been originally entered by the three-judge compensation court and the employer had appealed that

decision to this court and our decision had been exactly as it is, the employee would have been entitled to attorney's fees in both the compensation court and in this court. Under the supplemental opinion a majority of this court has now held that the employee is entitled to no attorney's fee at all in either court. That result, in the name of stare decisis, exalts form over substance at the expense of justice.

The supplemental opinion rests on the case of *Rexroat v. State*, 143 Neb. 333, 9 N.W.2d 305 (1943). That case has been cited with approval on one or two later occasions and is now reaffirmed by the majority in the supplemental opinion. The *Rexroat* case represents an erroneous and technical misinterpretation of the legislative intent in contradiction of the requirement that the Workmen's Compensation Act must be liberally construed so that its beneficent purposes may not be thwarted by technical refinements of interpretation. The fact that almost 40 years have passed since *Rexroat* does not constitute any reasonable justification for perpetuating an unjust result. *Rexroat v. State*, and its progeny, should be overruled.

KRIVOSHA, C.J., and WHITE, J., join in this dissent.

IN RE INTEREST OF CHADD CHIRNSIDE AND ROBIN CHIRNSIDE, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARLENE CHIRNSIDE, APPELLANT.

311 N.W.2d 876

Filed October 23, 1981. No. 43821.

1. **Parental Rights.** The right of a parent to maintain the custody of his or her children is a natural but not inalienable right, and the public has a paramount interest in the protection of the rights of a child.
2. ——. The court may terminate all parental rights between the parents and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that the parents are unable to

discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged, indeterminate period.

Appeal from the Separate Juvenile Court of Lancaster County. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Don C. Bauermeister for appellant.

Ron Lahners, Lancaster County Attorney, and Richard J. Hautzinger for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

The appellant, Marlene Chirnside (mother), appeals from an order entered by the separate juvenile court of Lancaster County, Nebraska, terminating her parental rights to her two minor children, Chadd Chirnside, born March 18, 1973, and Robin Chirnside, born March 5, 1974. Mother maintains that the State has failed to introduce clear and convincing evidence to establish that the best interests of the children require termination of her parental rights. We have examined the entire record in this case and conclude that the action of the separate juvenile court in terminating mother's parental rights is in fact supported by clear and convincing evidence and is in the best interests of the minor children. The judgment of the separate juvenile court must, therefore, be affirmed.

The parents of the minor children involved in this action were divorced on May 19, 1975. The custody of the children was placed with mother. On April 14, 1976, a petition was filed in the separate juvenile court of Lancaster County, Nebraska, alleging that the children were neglected children as defined by Neb. Rev. Stat. § 43-202(2) (Reissue 1978). The petition alleged that the children were without proper parental care in that their parents failed to provide them with proper care

necessary for their health and well-being, including failure to provide a clean and safe home, failure to provide adequate supervision, and refusal on mother's part to accept services offered by the Lancaster County Department of Public Welfare to correct the conditions of neglect. On April 28, 1976, the separate juvenile court found in fact that mother did not provide a home for her children which was clean and safe, and further found that the children were not given adequate supervision. Specifically, the court found that the environment provided by mother was unsafe and, unless immediately corrected, would be harmful to said children and that the children were without proper parental care as defined by § 43-202(2).

Notwithstanding the court's findings, the court delayed final disposition of the matter and gave mother 3 days to correct the situation. The court ordered that if mother made the home clean and safe within the 3-day period the children were to remain in her custody under caseworker supervision. If she failed to make the home clean and safe, the matter was to be returned to court for further hearing.

At the subsequent hearing the court found that indeed mother had made the home clean and safe and that the children could therefore remain in her custody under the supervision of a caseworker from the Lancaster County Department of Public Welfare. The court further determined that the court should retain jurisdiction of the matter and that the case be reviewed by the court every 6 months or on application of any interested party showing a change in circumstances requiring a different disposition.

The record then discloses a long series of hearings, orders, and conscientious efforts by the separate juvenile court to provide mother with every reasonable opportunity to improve her mental and physical condition so that she could have custody of her children. More than a dozen hearings were held between September 20, 1976, and September 4, 1980, when the

parental rights of the parents were finally terminated.

The record details an almost hopeless situation due to mother's mental condition which apparently is not reversible.

The home was constantly unsafe. On one occasion Chadd was found wandering in the streets unsupervised after 10 p.m. His mother was not at home. Chadd was found dirty, with a bad cold, and not appropriately dressed.

On several occasions mother was committed to either a Lincoln hospital or the Lincoln Regional Center for psychiatric treatment.

Many times during the 4 years, the children were moved between their mother and foster homes. Each time the court exercised great restraint, hoping to permit mother to regain custody of her children. Each effort by the court was met with failure by mother.

At a hearing held on December 4, 1978, mother admitted that the children were without proper care and supervision because mother had been admitted to the Lincoln Regional Center and was being held at the Lincoln Regional Center. By reason thereof the children were once again removed from the family home, Robin being placed with the maternal grandparents and Chadd being placed in foster care.

On May 12 and 13, 1980, a further hearing was held on the petition to terminate the parental rights of the parents. In its order entered on May 30, 1980, the separate juvenile court detailed all of the many hearings and trial placements which had occurred between April 28, 1976, and May 12, 1980. Specifically, the court found that mother has a mental illness which will continue for a prolonged, indefinite period; that she fails and refuses to take medication on a regular basis; and that the mental illness causes her to have psychotic episodes, and while being in a psychotic episode she is a threat to the safety of her children. The record discloses bizarre and irrational behavior by mother, including episodes of exposing herself to others and

making improper sexual advances toward one of Chadd's foster mothers.

The court further noted that while Chadd was living with mother he exhibited signs of anxiety in the school classroom and that this anxiety in the classroom was reduced when he was placed in a stable foster family home. The court further found that to return the children to the custody of mother was a threat to the physical safety of the children and also a threat to the psychological well-being of the children. All of these findings are amply supported in the record.

Dr. Burton Zung, clinical psychologist, testified that mother was unable to meet the emotional needs of her children. His conclusion was that no further services were available to help mother and that her parental rights should be terminated.

Dr. James Anthony, psychiatrist and consultant, diagnosed mother as a manic depressive and stated that she could not effectively parent while in that state.

Dr. Somasundaram Rajendran, another psychiatrist, also diagnosed mother as a manic depressive. He further stated that mother was a psychotic who suffered from delusions and was unable to take care of herself or her children. He also noted that mother had no insight into her problems, which made her possible treatment all the more unlikely.

Marge Ludden, Lancaster County social worker, told of mother's inability to provide a stable environment for her children because of her numerous changes in residence and because of the numerous jobs she had. She concluded that no further social services were left to help mother and recommended that her parental rights be terminated.

And finally, Chadd's foster mother, Linda Rappl, testified that Chadd's behavior was very unruly after being in mother's custody, but that it had improved markedly since living in the Rappl household. She also testified concerning mother's failure to provide Chadd with proper medical care and failure to properly clothe

him and Robin in cold weather. Finally, she testified in detail to the sexual advances made by mother toward her while Chadd was present.

We believe little purpose would be served to set out in further detail all of the evidence. Suffice it to say the evidence clearly and convincingly established that the children were neglected and dependent and the best interests of the children demanded that the parental rights of mother be terminated.

As a result of all the evidence, the trial court terminated the parental rights of mother as of May 30, 1980. The issue regarding the parental rights of the father was continued until July 22, 1980. Thereafter, on June 30, 1980, the father presented a plan concerning the care and custody of the children. By reason of that plan being proposed, the separate juvenile court set aside its previous order terminating the parental rights of mother so as to afford the father an opportunity to implement the plan. On August 28, 1980, a further hearing was held, at which time the court was advised that the father did not desire to proceed with the plan and did not desire to obtain custody of the children. By reason thereof the trial court concluded that the best interests of the children now demanded that the parental rights of both parents be terminated as to the minor children. On September 4, 1980, the separate juvenile court did terminate the parental rights of both parents to the minor children. The father has not appealed from that order and, as to the father, the order is final. It is only with regard to mother that an appeal has been taken and that we need consider at this time.

As we have frequently noted, no case presents for the court a more difficult problem than a case involving the termination of parental rights. No solution is ever adequate to meet the problem. Yet this court is obligated to protect the interests of minor children and must do the best it can under the circumstances. As we noted in *In re Interest* of *Hill*, 207 Neb. 233, 239, 298 N.W.2d 143, 146 (1980): "Everyone wishes to do that which appears

to be best for the minor children, yet one cannot be certain what is really best in each situation. It is for that reason that we have established certain basic rules by which we are to be governed in cases of this nature. These rules are intended to recognize the integrity of the family and to bring about parental termination only when that appears to be required and no other reasonable alternative exists."

Moreover, as we noted in *In re Interest of J.L.L.*, *ante* p. 76, 84-85, 306 N.W.2d 175, 180-81 (1981): "[T]he right of a parent to maintain the custody of his or her children is a natural but not inalienable right and the public has a paramount interest in the protection of the rights of a child."

The instant case is an example of the trial court making every effort to provide mother the opportunity to rehabilitate herself so as to properly care for her children. The record further discloses that mother is simply unable to accomplish that result due to her mental condition. While that is regrettable and may very well be a matter over which mother has no control, the courts cannot ignore their obligation and duty to provide for the best interests of the minor children. Neb. Rev. Stat. § 43-209(5) (Reissue 1978) was specifically designed to address the very problem found in this case. That section of the statute provides in part: "The court may terminate all parental rights between the parents . . . and such child when the court finds such action to be in the best interests of the child and it appears by the evidence . . . (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period."

The evidence is without question that mother's mental illness will continue for a prolonged, indefinite period and while so mentally affected she is unable to discharge her parental responsibilities. Furthermore, there is more than sufficient evidence from which this

court can find by clear and convincing evidence that the best interests of the children in this case demanded termination of parental rights.

While we have frequently held that an appeal of a juvenile proceeding to this court is heard de novo upon the record, we have further held that the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. See, *In re Interest of Kain, ante* p. 229, 307 N.W.2d 119 (1981); *In re Interest of J.L.L., supra; In re Interest of McKee*, 208 Neb. 623, 304 N.W.2d 918 (1981). The evidence in this case fully and completely supports the action taken by the separate juvenile court in terminating the parental rights of mother. To do otherwise would be wholly improper. We might wish it to be otherwise. Good intentions either on the part of mother or this court are not sufficient. Only providing for the best interests of the children is sufficient. Hope as we might to discover some other alternative which might permit mother to retain the children, we are unable to do so.

The judgment of the separate juvenile court terminating the parental rights of mother to the two minor children, Chadd Chirnside and Robin Chirnside, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. MEYER, ALSO KNOWN AS MIKE MEYER, AND KAREN M. MEYER, ALSO KNOWN AS KIRBY MEYER, APPELLANTS.

311 N.W.2d 520

Filed October 23, 1981. Nos. 43898, 43899.

1. **Search Warrants: Constitutional Law.** The provisions of Neb. Rev. Stat. § 29-411 (Reissue 1979), providing for entry for search pursuant to warrant "without giving notice of his authority and purpose, if the

judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of . . . if such notice be given," do not offend the fourth amendment prohibition against unreasonable search and seizure.

2. **Search and Seizure: Judicial Notice.** A court may take judicial notice of the fact that substances such as cocaine, LSD, and certain forms of prepared marijuana may be easily and quickly disposed of by flushing down a toilet or drain.
3. **Search Warrants: Affidavits.** Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was creditable or his information reliable.
4. ____: ____. An affidavit for a search warrant is not defective simply because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay. Firsthand knowledge of an informant, acquired by sight or hearing, is self-corroborating and tends to fulfill both aspects of the *Aguilar* test.
5. **Sentences.** A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations.

Appeal from the District Court for York County: WILLIAM H. NORTON and BRYCE BARTU, Judges. Affirmed.

Dennis D. Burchard for appellants.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The defendants, Michael L. Meyer and Karen M. Meyer, husband and wife, were charged in three counts as follows: (1) Possession of cocaine with intent to deliver, (2) possession of lysergic acid diethylamide,

otherwise known as LSD, and (3) possession of marijuana with intent to manufacture and deliver; all contrary to the provisions of Neb. Rev. Stat. § 28-416 (1)(a) and (3) (Cum. Supp. 1980). A jury trial was waived. In the trial before the court both defendants were found guilty. Each was sentenced to concurrent terms on each count of 1 to 2 years, Michael to be imprisoned in the Nebraska Penal and Correctional Complex and Karen in the Nebraska Center for Women.

On appeal to this court the defendants have assigned and argued the following alleged errors: (1) The trial judge erred in denying their respective motions to suppress various items of evidence seized in the search of their residence pursuant to a "no-knock" search warrant; and (2) In imposing sentence the trial judge erred in considering the recommendations and contents of letters from the probation officer dated October 10, 1980, without, it is claimed, making the contents known to defendants' counsel.

The contentions of the defendants with reference to the search and seizure issue are: (1) That with certain exceptions, the unannounced entry of police officers into a private residence, with or without a warrant, is a violation of the prohibition against unreasonable searches and seizures contained in the fourth amendment to the Constitution of the United States; and (2) The affidavit presented to the magistrate and upon which the warrant was based is insufficient to establish probable cause. In support of their contentions, the defendants rely principally upon *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), respectively.

Neb. Rev. Stat. § 29-411 (Reissue 1979) provides, insofar as relevent to the issues in evidence in this case: "In executing . . . a search warrant . . . the officer may break open any . . . door . . . of a dwelling . . . if, after notice of his office and purpose, he is refused

admittance; *or without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of . . . if such notice be given . . . .*" (Emphasis supplied.)

In the case before us, the warrant contained the above statutory "no-knock" direction and was issued upon an affidavit which we summarize as follows. The affiant, a Nebraska State Patrol drug investigator, stated that he had been involved in numerous investigations involving controlled substance activities and had general familiarity with the slang terms for the various controlled substances; that on October 1, 1979, he interviewed a confidential informant whose information had proven reliable in the past and as a result of which previous arrests and convictions for controlled substance violations had been made; and that the affiant believed the informant was reliable in the present instance. Based upon his own personal observation in the defendants' residence, the informant told the affiant that Mike Meyer had in his possession in said residence within the past 10 days quantities of "coke," "hash," and "pot." In the drug vernacular these terms refer to cocaine, concentrated marijuana, and marijuana. The affiant had overheard a conversation relating to the sale of controlled substances at the residence of the defendants and had made a personal surveillance of the outside of the residence. A separate sentence and paragraph in the affidavit was as follows: "The cocaine is located in a tupperware container located on the first floor of the residence very close to a toilet area." The affiant recited that it had been his experience that persons who deal in controlled substances keep devices and paraphernalia used in the preparation, sorting, processing, and packaging of the substances; that some drugs may be

quickly disposed of or destroyed; and that unless the warrant provided for nighttime entry without notice on this particular night, the first of October, the substances may not be present the next day.

On the night of October 1, following surveillance of the premises and observing lights on in the house and a man present in the house sitting near a window upon which the drapes were not tightly drawn, the police made a forcible entry into the residence without notice.

The ensuing search resulted in the seizure of cocaine, processed and growing marijuana, and LSD, as well as various items of drug paraphernalia. Also found were a variety of other drugs, some of which, but not all, were controlled substances.

The first question with which we are confronted is whether the holding of the Supreme Court of the United States in *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), nullifies the provision of § 29-411 pertaining to unannounced entries with warrant. We conclude it does not. *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963), countenances the procedure authorized in the portion of the statute which we have quoted.

Payton involved the unannounced entry into a residence without a warrant to make, what the court referred to as, a routine felony arrest; in other words, an arrest upon probable cause but without warrant and absent any exigent circumstances. In *Payton*, the person to be arrested was charged with homicide and was absent from the residence at the time the entry was made. As a result of the entry, the firearm which had been used in the homicide was seized. The court held that a motion to suppress the use of the firearm as evidence should have been sustained. It further held that absent exigent circumstances the residence may not be entered without a warrant and that a warrant founded on probable cause carries with it limited authority to enter a building when there is reason to

believe the suspect is within the structure. In *Payton*, no question concerning the necessity of announcing identity and purpose before entry was involved.

Ker v. California, *supra*, involved the following facts. Officers, in the course of a controlled substances investigation, observed what appeared to be a drug transaction between the defendant and another. They followed the defendant to his apparent residence and, with the aid of a passkey obtained from the landlord, made an unannounced entry for the purpose of preventing the destruction of evidence.

The Court, in its discussion in the above opinion, recognized that in general the validity of an arrest, absent constitutional restriction, is controlled by state law. In discussing the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), it said in *Ker* at 31: "Mapp, however, established no assumption by this Court of supervisory authority over state courts, cf. *Cleary v. Bolger*, 371 U.S. 392, 401 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law." The Court held the search was justified as incident to a valid arrest on probable cause and there was probable cause (we have not recited all the pertinent evidence) to believe a felony offense had been or was being committed on the premises. The evidence established the information came from a reliable informant. The Court assumed the entry by key was equivalent to a breaking. It expressly approved the opinion of the California Supreme Court in *People v. Maddox*, 46 Cal. 2d 301, 306, 294 P.2d 6, 9 (1956), which said: "Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844." Section 844 permitted officers to make forced entry after identifying themselves and announcing their purpose.

The U.S. Supreme Court said in *Ker* at 40: "Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police." The summary appearing in the reporter preceding the opinion says in part at 23: "The States are not precluded from developing working rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement,' provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

The defendants also cite *Sabbath v. United States*, 391 U.S. 585, 88 S. Ct. 1755, 20 L. Ed. 2d 828 (1968). That case did not involve a determination of the reasonableness of an entry and search under constitutional provisions. It involved only the requirements of the federal statute requiring "notice of authority and purpose" and whether the search and arrest were valid under the statute. The Court, in its opinion, pointed out that the statute codified the common law, and held that since the requirements of the statute had been violated, the arrest and search were invalid. No warrant was involved in this case. The holding in *Sabbath* has no application to the facts before us.

Supporting the view we take here, in addition to *People v. Maddox*, *supra*, is *State v. Young*, 76 Wash. 2d 212, 455 P. 2d 595 (1969).

We believe we can take judicial notice of the fact that substances such as cocaine, LSD, and certain forms of prepared marijuana may be easily and quickly disposed of by merely flushing them down a toilet or drain, both of which were located in the residence in the case before us. *People v. De Lago*, 16 N.Y.2d

289, 213 N.E.2d 659, 266 N.Y.S.2d 353 (1965).

The second question related to the validity of the search warrant is whether or not the affidavit submitted to the magistrate upon which the search warrant was issued is sufficient to satisfy the constitutional requirement of probable cause. In *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), the Supreme Court of the United States said: "Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was creditable or his information reliable." (Syllabus of the court.) In applying the above test, we have said: "An affidavit for a search warrant is not defective simply because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay. Firsthand knowledge of an informant, acquired by sight or hearing, is self-corroborating and tends to fulfill both aspects of the Aguilar test." *State v. Howard*, 188 Neb. 494, 197 N.W.2d 641 (1972) (syllabi of the court).

In the present case the affidavit contains the information that the affiant was acquainted with the informant; that the informant had previously provided useful and reliable information and that arrests and convictions had resulted from that information. Furthermore, it appears from the affidavit that the information as to the presence of controlled substances in the residence was obtained by the informant's personal observation while in the residence in the recent past. The affidavit contains details of the facts observed, to wit, the nature of the controlled substances, the nature of the containers in which one of the substances was located, and the location thereof, includ-

ing the fact that it was located near a toilet. The defendants urge that the sentence of the affidavit we have quoted earlier in this opinion does not specifically show the source of the information as to the location of the Tupperware container holding cocaine. Even without that specific information the affidavit is sufficient. However, the affidavit must be read in a commonsense and realistic fashion. Taking the affidavit as a whole, it is clearly inferable that the information contained in the particular sentence was based upon the personal observation of the informant. Affidavits for warrants must be tested in a commonsense, realistic fashion. *State v. Glouser*, 193 Neb. 190, 226 N.W.2d 328 (1975). We hold the affidavit was sufficient to establish probable cause, and as such the warrant in the form in which it was issued, entry without announcement of identity and purpose, was properly authorized.

The defendants argue that the trial court, in imposing sentence, erred in considering the contents and recommendations of the probation officer made in separate letters, dated October 10, 1980, addressed to the court pertaining to each of the defendants. The defendants' counsel asserts the letters were not part of the presentence investigation and were not shown to counsel before sentencing on October 24, 1980. Counsel alleges in his brief that the letters contained false information which would have been rebutted had he known the contents. However, he does not identify the false information. The pertinent letters are before us and came to us in the envelope in which the presentence investigation report was transmitted. Also included are a number of letters of character reference submitted by the defendants at the time of sentencing. We have no reason to doubt counsel's assertion that he did not see the letters; however, that fact does not appear in the record. Neither do we have any reason to believe that the court concealed the letters from counsel.

However, we have examined the letters and they contain few factual references. Those few factual references made are also found in various parts of the presentence investigation which counsel admittedly examined. One example of such a reference is the fact that controlled substances other than those which relate to the charges filed were found in the residence. This fact appears in the presentence investigation. The remaining portions of the letters are largely conclusions and recommendations. The same conclusions and recommendations could be reached by the sentencing judge based upon the information in the presentence investigation. Even if the defendants or their counsel did not see the letters, no prejudicial error resulted. "The law is well established in this state that in considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant. 'A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed and the judge may consider *probation officer reports*, police reports, affidavits, and other information, including his own personal observations.'" *State v. Stranghoener*, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MARK W. PROSSER, APPELLANT.

311 N.W.2d 525

Filed October 23, 1981. Nos. 44006, 44007.

1. **Criminal Law: Sentences.** The District Court after arrest may consider time spent in a medical institution pursuant to a valid mental health

commitment in determining credit for time to be applied against the sentence.

2. ____: ____. It was not an abuse of discretion for the trial court to fail to give credit for time spent in a mental institution where the sentence pronounced was not the statutory maximum for the offense.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed.

Richard G. Kopf of Cook & Kopf, P.C., for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

The appellant, Mark W. Prosser, pursuant to a plea bargain, pleaded guilty to three counts contained in two informations: Count I, subjecting another person to sexual penetration and overcoming such person by threat of force, Neb. Rev. Stat. § 28-319 (Reissue 1979); count IV, use of a firearm to commit a felony, Neb. Rev. Stat. § 28-1205 (Reissue 1979); and escape from confinement while under arrest for a felony, Neb. Rev. Stat. § 28-912 (Reissue 1979). Sexual assault, a Class II felony, is punishable by a maximum of 50 years' imprisonment and a minimum of 1 year's imprisonment. Use of a firearm in the commission of a felony is a Class III felony and provides for a maximum penalty of 20 years' imprisonment or a $25,000 fine, or both, with a minimum of 1 year's imprisonment. Escape is also a Class III felony with the same penalties.

The court sentenced the appellant on the sexual assault charge to a minimum of 8 years and a maximum of 12 years in the Nebraska Penal and Correctional Complex, and awarded credit for 178 days spent in jail. The court sentenced the appellant to a minimum of 1 year and a maximum of 18 months on the commission of a felony with a firearm charge. This sentence was to be served consecutively to the sexual assault charge. On

the escape charge, the court sentenced the appellant to 1 year's imprisonment to be served concurrently with the sexual assault charge. The court, after examination by court-appointed psychiatrists, determined that the appellant was a treatable, mentally disordered sex offender and ordered him confined in the Lincoln Regional Center. The appellant does not appeal from that finding.

The appellant's assignments of error are: (1) The district judge failed to credit time spent by the appellant while involuntarily committed to a mental institution while awaiting trial; and (2) The district judge's sentences were excessive in light of the unanimous opinion of the medical experts that incarceration would neither protect the public nor serve the rehabilitative needs of the appellant.

Appellant was arrested for the crime of sexual assault on May 2, 1979, the same date as the date of the offense. He requested bail but it was not granted. While in custody, the appellant escaped by covering a plastic fork with aluminum foil and persuading the deputy sheriff that he had a knife. On the next day he voluntarily surrendered himself to his attorney. On May 21, 1979, the appellant was bound over to the District Court for trial. While awaiting trial in the District Court, the appellant was apparently examined by a psychiatrist retained by the State of Nebraska, and apparently pursuant to some plea negotiations which are reflected in the ultimate disposition of the case, the State of Nebraska commenced an action before the Dawson County Mental Health Board to have the appellant found to be a mentally ill dangerous person. After being found to be a mentally ill dangerous person, the appellant was committed to the River Oaks Psychiatric Hospital in New Orleans, Louisiana, and ordered to pay the costs of his treatment. The parents of the appellant were apparently financially able to afford such treatment. Appellant was a patient in the hospital from September 5, 1979, to May 28, 1980, when he left the

hospital without permission. He was subsequently arrested in New Orleans, Louisiana, on or about October 30, 1980. He was returned to Dawson County, Nebraska. It is the period of September 5, 1979, to May 28, 1980, the time spent by the appellant in the psychiatric hospital in Louisiana, which is the basis for the first error claimed. The record is clear that the trial judge was aware of the time spent in the psychiatric hospital. He referred to it in his sentencing remarks and determined not to afford the appellant any credit for time spent in the hospital. Neb. Rev. Stat. § 83-1,106 (Reissue 1976) provides in part: "(1) Credit against the maximum term and any minimum term may be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. *This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services.*" (Emphasis supplied.)

While there are no cases in Nebraska suggesting that credit for time spent in a mental hospital prior to sentence cannot be given, it seems from the clear wording of the statute that the court may consider time spent in a medical institution pursuant to a valid mental health commitment in determining credit for time to be applied against the sentence. We have further held that it is within the trial court's discretion whether to grant credit for time spent in jail prior to sentencing.

The appellant further cites our case of *State v. Blazek*, 199 Neb. 466, 259 N.W.2d 914 (1977), as authority for the proposition that it is an abuse of discretion not to give credit for time spent in custody while awaiting trial. The appellant misapprehends the holding in that case. While we did hold in syllabus No. 4 of *Blazek* that "Ordinarily a defendant should be given credit for time spent in jail prior to sentencing," the specific holding

in that case is that where the maximum term of the sentence pronounced is the statutory maximum for the offense, credit for jail time must be given. The court suggested that constitutional difficulties might thereby arise whereby a defendant would be, in fact, in custody for a period longer than the statute authorized. The appellant was sentenced to a maximum possible term of 13½ years. If the maximum term was imposed and the sentence imposed was consecutive, the appellant could have received a term of 90 years. Although the record is not totally clear on this subject, it can be inferred that the mental commitment was initiated, if not at the request of, at least with the willing cooperation of appellant and his parents who were apparently financially able to bear the rather extraordinary cost of the confinement. The confinement was ordered to be a minimum 1 year in the River Oaks sanitarium. It is true from the reports which were received in evidence that appellant was making excellent progress in resolving what can only be charitably called severe mental problems. The appellant negated any such treatment and any long-term effects of that treatment by going a.w.o.l. from the institution and concealing himself from the authorities for a period of nearly 6 months. The trial court did properly take into consideration the appellant's deliberate frustration of the purpose of the mental health commitment by removing himself from the hospital. We are unable to say that it was an abuse of discretion in so doing. *Blazek*, *supra*, does not command a different result. The appellant suggests that since this is a nonbailable offense, the failure to credit for the time spent in the mental hospital was a violation of appellant's equal protection and due process rights. He does not cite any authority that so directly holds. All cases on which the appellant relied, which will not be cited here, simply are cases in which a statute authorizes the court to grant such credit. As we have stated above, there is nothing within the Nebraska statutes that would prohibit such credit if

the trial court determined to give it. The question here, however, is simply whether or not the trial court abused its discretion. We are unable to conclude that it did so. The assignment of error is without merit.

The second assignment of error is that the sentences are excessive and a violation of the rehabilitative needs of the appellant. There was testimony received from a psychiatrist that ultimate incarceration in the Nebraska Penal Complex would be harmful to the appellant and would undoubtedly render him more dangerous on discharge than he is admittedly at this time. Further psychiatric testimony indicates that the appellant is suffering from a mental disorder that makes him antagonistic toward women, unsure of them, and likely to take out his hostilities in violent sexual acts. All agree that the appellant must be confined and should not be allowed at liberty.

The offense for which the appellant pleaded guilty merits the sentence which the court imposed. The appellant accosted and stopped an automobile operated by a young female on a rural road near Lexington, Nebraska. He used a gun to force her from the automobile and discharged the gun either accidentally or purposefully, removed her to his own automobile, took her farther into the country, and there forcibly raped her twice. While awaiting trial on the charges, he escaped from custody and further escaped from a mental hospital to which the trial court and the State had ordered him committed. The trial court took into account, in weighing these matters, the seriousness of the offense, the dangerousness of the offender, and the prior extended misdemeanor record of the appellant. It then concluded that, both for the protection of society and in view of the seriousness of the crimes, the sentences imposed were appropriate. It is well established in this state, as to require no citations, that a sentence imposed within the limits of the statute will not be disturbed on appeal absent an abuse of discretion. We find no abuse of discretion.

The assignments of error of the appellant are without merit and the judgment and sentences are therefore affirmed.

AFFIRMED.

McCOWN and CLINTON, JJ., concur in result.

STATE OF NEBRASKA, APPELLEE, V. DELMA LOZANO, APPELLANT.

311 N.W.2d 529

Filed October 23, 1981. No. 44008.

1. **Wiretaps.** Neb. Rev. Stat. § 86-705 (Reissue 1976) requires that each application for a wiretap shall be made in writing upon oath or affirmation to a judge of the District Court, and shall include a full and complete statement of the facts and circumstances relied upon to justify the applicant's belief that an order should be issued. The application shall give a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed.
2. ____. Neither specific nor all possible investigative techniques must be tried before orders for wiretaps can be issued, nor is the government required to use a wiretap only as a last resort.
3. ____. It is not necessary for the State to utilize all investigative techniques before making an application for a wiretap.
4. **Wiretaps: Affidavits.** An affidavit is sufficient if it contains a full and complete statement of the underlying factual circumstances which justify the issuance of an order authorizing a wiretap.
5. ____: ____. Staleness is an issue which must be decided on the peculiar facts of each case.
6. ____: ____. Documents incorporated into an affidavit by reference need not be sworn to separately.
7. **Criminal Trials.** A trial court is not required to make written conclusions of fact and conclusions of law in a criminal trial.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

David T. Schroeder for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

After trial to the court upon stipulated facts, the defendant was convicted on one count of possession of more than 1 pound of marijuana and one count of possession of cocaine. She was sentenced to 1 year's imprisonment on each count, the sentences to run consecutively.

On appeal the principal assignments of error relate to the sufficiency of the evidence to sustain the order authorizing the interception of wire communications. Evidence obtained as a result of the wiretap was also used to obtain a search warrant. The defendant contends her motions to suppress filed in the trial court should have been sustained.

Specifically, the defendant argues that the application for the wiretaps failed to set out full and complete statements as to whether other investigative procedures had been tried and failed or why it reasonably appeared they would be unlikely to succeed. Neb. Rev. Stat. § 86-705 (Reissue 1976) provides in part: "Each application for an order authorizing or approving the interception of a wire or oral communication . . . shall include the following information: . . . (c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous . . . ."

The application, filed on January 29, 1980, incorporated the affidavits of two Scottsbluff, Nebraska, police officers, a Nebraska State Patrol drug investigator, and an informant. The police officers' affidavits set out in detail the various investigative methods that had been tried in attempting to infiltrate a suspected narcotics ring involving people in Scottsbluff, including attempts to use undercover policemen from other jurisdictions, surveillance of the houses and activities of the parties

believed to be involved, and attempts to get information about the ring from victims. The affidavits noted that local officers were handicapped in their investigation attempts because they were instantly recognized by members of the ring; that the ring consisted mainly of black and Hispanic persons, and that currently there were no black or Hispanic officers available to the Scottsbluff Police Department to attempt infiltration; that in 1979 infiltration using police officers from the Cheyenne, Wyoming, police department was unsuccessful; that the persons involved in the ring were longtime friends, relatives, and associates and refused to deal with anyone they did not know; that dissatisfied customers of the ring would not give information to police; and that surveillance of the Lozano residence was not possible because the residence was out in the country and the openness of the surrounding area did not lend itself to covert operations.

In *State v. Kolosseus*, 198 Neb. 404, 415, 253 N.W.2d 157, 163 (1977), we said: "'There is no requirement that every investigative methodology be exhausted prior to application for a [wiretap] authorization. . . . It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation.' . . . We conclude that what is required under the first alternative is that the application make a full and complete disclosure of all that has been done so that the court may make a judgment as to whether more should be required before a tap is authorized." In *State v. Holmes and Beardslee*, 208 Neb. 114, 121, 302 N.W.2d 382, 386 (1981), we held that "it is not necessary for the State to utilize all investigative techniques before making an application for a wiretap." We further noted there that "'wire tap "procedures were not to be routinely employed as the initial step in criminal investigation," but it is equally true "that the statute does not require the government to use a wire tap only as a last resort." United States v. Kerrigan,

514 F.2d 35 (9th Cir. 1975); United States v. Staino, 358 F. Supp. 852, 856-7 (E.D. Pa. 1973).'" *Id.* at 122, 302 N.W.2d at 386.

The affidavits in this case listed numerous investigative techniques that had been tried and failed, and also set out a number of reasons as to why other investigative procedures would be likely to fail. We find the affidavits were sufficiently detailed to satisfy the requirements of § 86-705(c).

The defendant also argues that the affidavits accompanying the application for wiretap authority were not sufficient to establish probable cause that she was committing, had committed, or was about to commit a crime enumerated by Neb. Rev. Stat. § 86-703 (Reissue 1976). One of the enumerated crimes in that section is "dealing in narcotic or other dangerous drugs." The affidavits set out several items having to do with the defendant, including information from a confidential informant, proven reliable by independent investigation, that she was selling dope through Bruce's Tavern in Scottsbluff. Searches of the defendant's residence on other occasions had revealed the presence of drug paraphernalia on the premises. Telephone toll records showed that within the 3 months before the application, several calls had been made from the defendant's telephone to Keystone Yacht Sales in Florida, an enterprise run by a person suspected of being a drug trafficker. Checks of license numbers on automobiles parked at the defendant's residence revealed that some of those automobiles were registered to persons known to be or reasonably suspected of being drug-law offenders.

The defendant's main argument in this respect is that the information in the affidavits referring to her came from undisclosed informants and was remote in time from the date of the application. However, the affidavits stated that the information from informants had been verified by independent investigation. The information obtained was sufficiently specific and detailed

to meet the reliability tests set out in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

As to the remoteness issue, *United States v. Hyde*, 574 F.2d 856, 865 (5th Cir. 1978), *rehearing denied* 579 F.2d 643, states: "[T]he staleness issue must be examined more liberally when a continuing pattern of criminal activity is alleged. . . . [S]taleness is an issue which must be decided on the peculiar facts of each case, and . . . a mechanical count of days is of little assistance in this determination. Here, the affidavit alleged a conspiracy that had continued for at least 2 years. It included information considerably less than 2 months old as well as the most recent telephone records available. It was permissible . . . to infer that if criminal conversations had been occurring over this telephone line over the past 2 years, they had not mysteriously stopped within the past month. We cannot disturb on staleness grounds his finding of probable cause."

We find similar circumstances in the present case. The applications alleged an ongoing conspiracy; the information in the affidavits showed that the investigation, as well as criminal activity, had continued up to the very day of the application; and the telephone records relied upon were current as of late December 1979, less than 1 month before the application was made. The information in the affidavits was sufficiently close in time to the application to allow a finding of probable cause as against the defendant. The assignment of error is without merit.

The defendant next argues that the search warrant used to conduct the search of her residence was defective on its face and that the supporting affidavit did not establish probable cause. The argument as to defectiveness is that the transcripts of intercepted telephone calls referred to in the supporting affidavit were not supported by oath or affirmation as required by Neb. Rev. Stat. § 29-814.01 (Cum. Supp. 1980). Here, the

affidavit referred to and incorporated the transcripts of the telephone calls. This was sufficient to satisfy the requirements of the statute.

The defendant further complains that the county judge did not testify specifically as to which transcripts he relied upon in issuing the search warrant.

The issuing magistrate's inability to recall specifically which transcripts he relied upon does not prevent a finding that he did have probable cause to issue the warrant. He testified that he considered each transcript referred to in the affidavit to be part of the application, and the transcripts which refer to criminal activity of the defendant sufficiently establish probable cause to support the issuance of the warrant. The assignment of error is without merit.

The defendant further contends the sentences imposed were excessive. Under the circumstances in this case, the sentences imposed were minimal and the record shows no abuse of discretion.

The defendant complains that the trial court refused to make specific findings of fact and conclusions of law. Neb. Rev. Stat. § 25-1127 (Reissue 1979), upon which the defendant relies, has no application to criminal proceedings.

The judgment of the District Court is affirmed.

AFFIRMED.

KATHERINE A. BURROWS, APPELLANT, V. A. BYRON JACOBSEN, APPELLEE.

311 N.W.2d 880

Filed October 30, 1981. No. 43477.

1. **Negligence: Evidence.** The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury.
2. **Motor Vehicles.** It is unlawful for the driver of a vehicle to turn left unless and until such movement can be made with reasonable safety.
3. **Motor Vehicles: Right-of-Way.** The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard.
4. **Right-of-Way: Words and Phrases.** By "right-of-way" is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other.
5. **Proper Lookout.** A motorist must see what is in plain sight.
6. **Proper Lookout: Right-of-Way.** Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving.
7. **Right-of-Way.** One does not forfeit his right-of-way by driving at an unlawful speed.
8. **Negligence.** Negligence is not presumed and the mere happening of an accident does not prove negligence.
9. **Negligence: Proof.** Where, in an action to recover for personal injuries, the jury is properly instructed as to the burden of proving the negligence charged against defendant as a proximate cause of the injury, the defense that the negligence of a third person not a party to the action is the sole proximate cause is not an affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is entirely consistent with and provable under the general issue where the burden of proof remains with the plaintiff to prove the alleged negligence of the defendant.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

James W. Crampton for appellant.

Ray C. Simmons, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

On August 11, 1978, the plaintiff, Katherine A. Burrows, was injured in an automobile accident at the intersection of Highway 370 and 84th Street, in Papillion, Nebraska. The plaintiff was a passenger in her own automobile driven by Robert C. Miller who was attempting to make a left turn onto 84th Street from Highway 370 in Sarpy County when the automobile was struck by the automobile of the defendant, A. Byron Jacobsen. After the accident the plaintiff complained of a sore back and neck and was taken to the Midlands Community Hospital for treatment. The plaintiff's automobile was being driven east and the defendant's automobile west on Highway 370.

Plaintiff brought an action for damages for personal injuries and medical expenses in the Douglas County District Court. The action was removed to Sarpy County District Court. Trial was had to a jury and a verdict was returned for the defendant. Following motions for new trial or judgment notwithstanding the verdict, which were overruled, the plaintiff appealed. Plaintiff raised the following assignments of error on appeal: (1) The trial court erred in failing to direct a verdict for the plaintiff and in failing to find the defendant negligent as a matter of law; (2) The trial court erred in overruling plaintiff's objection to jury instruction No. 5; and (3) The trial court erred in not granting plaintiff's motions for a new trial and judgment notwithstanding the verdict.

We will discuss the first and third assignments of error together. The plaintiff cites *Fangmeyer v. Reinwald*, 200 Neb. 120, 124-25, 263 N.W.2d 428, 431 (1978). *Fangmeyer* states: "It is clear, however, that the question of the existence of negligence or contributory negligence is for the trier of fact whenever different

minds may reasonably draw different conclusions from the evidence, and a directed verdict is proper only when reasonable minds cannot differ. [Citations omitted.] It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury." We said in *Schanaman v. Ramirez*, 206 Neb. 212, 215-16, 292 N.W.2d 39, 41-42 (1980): "Plaintiff's claims must be tested in accordance with the following rules of substantive law.

"It is unlawful for the driver of a vehicle to turn left unless and until such movement can be made with reasonable safety. Neb. Rev. Stat. § 39-652 (Reissue 1978). The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard. Neb. Rev. Stat. § 39-636 (Reissue 1978); *Floridia v. Farlee*, 201 Neb. 39, 266 N.W.2d 204 (1978). By 'right-of-way' is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other. Neb. Rev. Stat. § 39-602(81) (Supp. 1979). A motorist must see what is in plain sight. *Davis v. Spindler*, 156 Neb. 276, 56 N.W.2d 107 (1952); *Caldwell v. Heckathorn*, 176 Neb. 704, 127 N.W.2d 182 (1964). A driver who fails to see another who is favored over him is guilty of negligence as a matter of law. *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976); *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960). However, although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving. *Nichols v. McArdle, supra; Bonnes v. Olson, supra; Hayes v. Anderson Concrete Co., Inc.*, 186 Neb. 771, 186 N.W.2d

477 (1971). One does not forfeit his right-of-way by driving at an unlawful speed. *Epperson v. Utley*, 191 Neb. 413, 215 N.W.2d 864 (1974). Negligence is not presumed and the mere happening of an accident does not prove negligence. *Farro v. Rubottom*, 202 Neb. 120, 274 N.W.2d 149 (1979); *Wolcott v. Drake*, 162 Neb. 56, 75 N.W.2d 107 (1956)."

The evidence indicates that Highway 370 is a two-lane highway until it approaches the intersection of 84th Street where it broadens into a four-lane highway. The automobile in which plaintiff was riding approached the intersection, stopped for a red light, signaled an intention to turn left, and when the light changed to green it slowly started to execute the left turn. As the driver cleared the southernmost lane of the westbound lanes, in front of two motorcyclists who were waiting in the westbound lane to turn left, or south, onto 84th Street, the driver saw the defendant's westbound automobile out of the corner of his eye and the vehicles collided in the northernmost lane of westbound Highway 370. The plaintiff introduced testimony and an admission against interest that the defendant's speed was between 60 and 70 miles per hour. The admission was denied by the defendant.

Applying the evidence to the law at hand, it is clear that different minds could reasonably draw different conclusions from the evidence. The location of the accident and the evidence of the circumstances surrounding the accident indicate that the defendant was approaching the intersection and was close enough to constitute an immediate hazard. There is no evidence indicating why plaintiff's driver failed to see the defendant's vehicle approaching the intersection until immediately before the collision.

We conclude, as did the trial court, that there was a jury question as to the negligence of the defendant and, further, that there was evidence of negligence of the plaintiff's driver which should have been submitted to the jury on the issue of whether the negligence of plain-

tiff's driver was the sole proximate cause of the accident. The plaintiff's first and third assignments of error are without merit.

The court's instruction No. 5 is drawn from and is nearly identical to NJI 2.01A (1975 Pocket Part) which reads as follows: "One of the issues in this case is whether the (accident, collision, occurrence) was caused by the conduct of (name of third person not a party to suit). If you find the sole proximate cause of the (accident, collision, occurrence) was the conduct of (name of third person), then your verdict should be for the defendant.

"The burden of proof on this issue is on the plaintiff; that is, the plaintiff has the burden to prove that some negligence of defendant as set forth in Instruction _____ was the proximate cause or a proximately-contributing cause of the (accident, collision, occurrence) and that therefore the negligence of (name) was not the sole proximate cause thereof."

We said in syllabus No. 4 in *Schmidt v. Johnson*, 184 Neb. 643, 171 N.W.2d 64 (1969): "Where, in an action to recover for personal injuries, the jury is properly instructed as to the burden of proving the negligence charged against defendant as a proximate cause of the injury, the defense that the negligence of a third person not a party to the action is the sole proximate cause is not an affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is entirely consistent with and provable under the general issue where the burden of proof remains with the plaintiff to prove the alleged negligence of the defendant." See, also, *Fynbu v. Strain*, 190 Neb. 719, 211 N.W.2d 917 (1973). The plaintiff complains that the instruction was misleading. We disagree.

No error being shown, the judgment of the trial court is affirmed.

AFFIRMED.

JAY A. LENSTROM ET AL., APPELLANTS, V. CHARLES THONE, GOVERNOR, ET AL., APPELLEES.

311 N.W.2d 884

Filed October 30, 1981. No. 43481.

1. **Constitutional Law: Colleges and Universities.** The Scholarship Award Program, provided by Neb. Rev. Stat. §§ 85-980 to 85-9,102 (Cum. Supp. 1980), does not violate Neb. Const. art. VII, § 11, or art. XIII, § 3.
2. **Legislative Power: Constitutional Law.** The Legislature has plenary legislative authority limited only by the state and federal Constitutions.
3. ____:____. The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution.
4. ____:____. The Nebraska Constitution is not a grant but a restriction of legislative power. Consequently, courts can enforce only those limitations which the Constitution imposes.
5. **Constitutional Law: Legislative Power: Public Purpose.** Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind.
6. **Constitutional Law: Legislative Power.** Implied restrictions on the legislative power are not to be inferred unless the restriction is one that is clearly implied.
7. **Constitutional Law: Public Purpose.** Legislation which serves a public purpose is not constitutionally impermissible because incidental benefits may accrue to others.
8. **Constitutional Law: Statutes.** A duly enacted statute is presumed constitutional and may not be invalidated by the court unless clearly in contravention of a provision of fundamental law or of public policy.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed.

Kermit A. Brashear II and Pamela K. Black of Nelson & Harding for appellants.

Paul L. Douglas, Attorney General, and Harold Mosher for appellees.

James W. R. Brown of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, amicus curiae.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an action commenced in the District Court for Lancaster County, praying for a declaratory judgment determining the constitutionality of 1978 Neb. Laws, L.B. 743, codified as Neb. Rev. Stat. §§ 85-980 to 85-9,102, inclusive (Cum. Supp. 1980). L.B. 743, commonly referred to as the Scholarship Award Program (hereinafter the Act), provides for a financial assistance program to "enable eligible undergraduate Nebraska residents to receive educational services in an eligible postsecondary educational institution of this state," § 85-981, all as defined by the Act.

The Act is administered by the Nebraska Coordinating Commission for Postsecondary Education. § 85-983. An award is a grant of money by the commission to an eligible student for educational expenses. § 85-992. Section 85-994 prescribes the conditions which attached to an award and eligibility requirements needed to attain an award. These include: (1) Direct distribution of the award to the student; (2) Enrollment in an eligible institution and maintenance of a minimal standard of performance; (3) The maximum amount of the award; "(4) The award is given on the basis of substantial financial need"; (5) The period covered by the award; (6) An agreement that the award be used only for educational expenses; "(7) The individual is not pursuing a course of study which is pervasively sectarian and creditable toward a theological or divinity degree"; and (8) Compliance with rules and regulations of the commission.

Eligible postsecondary educational institutions include both public and private institutions which are: "(1) Located in Nebraska;

"(2) Primarily engaged in instruction of students;

"(3) Satisfying the provisions of Nebraska law re-

lating to the approval, licensure, and accreditation of schools, colleges, and universities; and

"(4) Offering courses of instruction in regularly scheduled classes to regularly enrolled undergraduate students who reside in Nebraska and have received high school diplomas or their equivalent." § 85-984.

The petition alleges facts indicating the plaintiffs are persons eligible for the program. The defendants are the members of the Nebraska Coordinating Commission for Postsecondary Education. Also joined as defendants are the Governor, the Attorney General, the State Treasurer, and the State Auditor. The petition alleges the defendant Attorney General has rendered an opinion stating the Act is unconstitutional and, for that reason, the defendants have refused to implement the program as provided for by the Legislature. As such, the plaintiffs have been deprived of their opportunity to participate in the award program.

The defendants filed a demurrer to the plaintiffs' petition. The District Court sustained the demurrer, finding the Act, on its face, violated the portion of Neb. Const. art. VII, § 11, which provides: "Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof . . . ." The petition was dismissed by the District Court, and the plaintiffs have appealed to this court.

The defendants contend the statute is unconstitutional because it attempts to appropriate public funds in support of educational institutions not owned or exclusively controlled by the state, and because it attempts to extend the credit of the state to private individuals, that is, the students who would be the beneficiaries of the program.

The contention of the defendants with reference to article VII, § 11, may be summarized as follows: The scholarship program may inure to the benefit of private

postsecondary educational institutions because recipients may or will use some of the awards to pay tuition and fees and this constitutes a benefit to the institutions prohibited by article VII, § 11. They state the issues presented in this case are controlled by the prior opinions of this court in *State ex rel. Rogers v. Swanson*, 192 Neb. 125, 219 N.W.2d 726 (1974), and *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974).

They recognize the language of article VII, § 11, was amended by the voters in 1972, but assert the change made no substantive difference in the meaning of the section. Prior to the 1972 amendment the Constitution prohibited the appropriation of public funds "in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof." In 1972 this provision was amended to read: "Appropriation of public funds shall not be made *to* any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof." (Emphasis supplied.)

We will first discuss the proposition that the result in this case is controlled by our opinions in *State ex rel. Rogers v. Swanson, supra*, and *Gaffney v. State Department of Education, supra*. *Rogers* involved an act of the Legislature which provided for tuition grants to students attending private colleges only, and was enacted prior to the 1972 amendment to article VII, § 11. With reference to the language change in the constitutional amendment, the court said in *Rogers* the amendment did not affect the question involved because an act of the Legislature, unconstitutional when enacted, is null and void from its inception and, therefore, is not validated by a subsequent amendment to the Constitution authorizing its passage. We, in that case, expressly refrained from expressing an opinion on the effect of the constitutional change.

The opinion, however, noted the trial judge had found the purpose of the act was to aid private colleges and not to enable students to attend colleges of their choice. We sustained that finding. In that case we relied upon, among others, the precedent of *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971). In *Hartness* the Supreme Court of South Carolina applied a provision of the South Carolina Constitution which prohibited the use of the property or credit of the state "directly or indirectly" in aid of any church-controlled college and held that the clear purpose of the scholarship act was to aid "independent institutions of higher learning." The South Carolina court held the act unconstitutional.

Gaffney, supra, involved an act of our Legislature which provided for the loan of secular textbooks to children enrolled in private elementary schools. This statute, too, was enacted before the 1972 amendment to our Constitution. We held the act unconstitutional. The case was decided upon the basis of the constitutional provision as it existed at the time the statute was enacted. It is apparent in the two cases mentioned we did not decide the effect of the 1972 amendment.

The literal language of the amendment prohibits "appropriation . . . to" any school not owned by the state. The defendants assert this language has a broader meaning than its literal language imports. They would urge the Constitution prohibits any use of public funds which might either directly or indirectly aid a private school and that the 1972 amendment did not change the prior prohibition in any way. In supporting this argument, they point to the language in A Summary of Constitutional Amendments Proposed by the Nebraska Legislature (Neb. Legislative Council, March 1972). "The adoption of this proposed amendment would retain the above-mentioned prohibitions against sectarian instruction in public schools, the appropriation of public funds to any non-public school, and the requirement of any religious tests or quali-

fications for public school teachers or pupils, although these provisions would be re-worded somewhat. The meanings would remain the same." *Id.* at 28.

Even if that statement was deemed in any way "interpretive" of the provision, the plain language of the 1972 amendment does not support the defendants' contention. The statement of the Nebraska Legislative Council, simply put, is that the 1972 amendment retained the prohibition against "the appropriation of public funds to any nonpublic school," and that "the meanings would remain the same." The statement's effect is only that the prohibition against the appropriation of "public funds to any nonpublic school" would remain. That is what the Constitution says.

Defendants also argue the failure to enact a rather confusing constitutional amendment in 1976 somehow affects the meaning of the constitutional provisions adopted in 1920 and 1972. We know of no legal basis for such a contention. Even if the voters in 1976 expressed disapproval of a proposed amendment, such disapproval does not affect a change in constitutional interpretation.

In *Gaffney v. State Department of Education*, 192 Neb. 358, 362, 220 N.W.2d 550, 553 (1974), while discussing the previous language of the article in question, we said: "It [article VII, § 11] says what it means and means what it says." We think that the same statement must be applied to the language as changed. The effect of the literal language of the amendment is to prohibit appropriations made "to" a nonpublic school.

The holding of the Supreme Court of South Carolina in *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971), upon which we relied heavily in *State ex rel. Rogers v. Swanson*, 192 Neb. 125, 219 N.W.2d 726 (1974), has no application under the present constitutional language when applied to the statutory plan before us in this case. In the case of *Americans*

United v. Rogers, 538 S.W.2d 711 (Mo. 1976), the Supreme Court of Missouri said a tuition grant program to students of both public and private colleges, much like the one before us, did not offend various provisions of the Missouri Constitution, viz, prohibitions against use of public funds for a nonpublic purpose and use of public money directly or indirectly in aid of any denomination or religion. Under slightly different constitutional provisions the Alabama Supreme Court held similarly in *Ala. Ed. Ass'n v. James*, 373 So. 2d 1076 (Ala. 1979).

Certain fundamental constitutional principles must guide, and always have guided, us when the constitutional bounds of legislative power are questioned. The first principle is the Legislature has plenary legislative authority limited only by the state and federal Constitutions. *Swanson v. State*, 132 Neb. 82, 271 N.W. 264 (1937); *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972); *Orleans Education Assn. v. School Dist. of Orleans*, 193 Neb. 675, 229 N.W.2d 172 (1975). The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution. *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 113 N.W.2d 63 (1962). The state Constitution is not a grant but a restriction of legislative power. Consequently, courts can enforce only those limitations which the Constitution imposes. *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956). Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public

purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. *Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976). Implied restrictions on the legislative power are not to be inferred unless the restriction is one that is clearly implied. *State ex rel. Meyer v. County of Lancaster, supra.* Legislation which serves a public purpose is not constitutionally impermissible because incidental benefits may accrue to others. *Chase v. County of Douglas, supra; Cosentino v. City of Omaha*, 186 Neb. 407, 183 N.W.2d 475 (1971); *State ex rel. School Dist. of Hartington v. State Board of Education*, 188 Neb. 1, 195 N.W.2d 161 (1972). A duly enacted statute is presumed constitutional and may not be invalidated by the court unless clearly in contravention of a provision of fundamental law or of public policy. *United Community Services v. The Omaha Nat. Bank, supra; Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

In enacting the scholarship program, the Legislature made certain factfindings which they set forth in § 85-980. These were:

"(1) The provision of a higher education for all residents of this state who desire and are properly qualified for such an education is important to the welfare and security of this state and nation and consequently is an important public purpose;

"(2) Many qualified students are deterred by financial consideration from completing their education, with a consequent irreparable loss to this state and nation of talents vital to welfare and security;

"(3) The state can enhance its economic and social potential when the state's residents have the opportunity to contribute to the full extent of their capabilities through the removal of the financial barriers to their economic, social, and educational goals;

"(4) The state can enhance its educational objectives by the development of financial aid programs, including programs which enable the state to fully

qualify for federal student aid funds made available to the state through the Federal SSIG program under authority of Section 415 of the Higher Education Act of 1965, as amended, and related acts; and

"(5) To avoid the application of a double standard in carrying out its educational programs, the state needs to make certain that all students who qualify for aid stand equal to each other before the law, and that they be given the freedom, within reasonable and constitutional limits, to select the institutions of their choice in which to pursue their educational goals."

In the absence of some plain restriction in the Constitution, it is not for this court to say the scholarship awards for needy students, paid directly to the student, which may be used at any eligible institution, private or public, as defined by the Act, and which may not be used for pursuing courses of study which are pervasively sectarian and creditable toward a theological or divinity degree, do not serve a public purpose. Nor is it for this court to say the Legislature is not justified in making the finding a public purpose, which it did in this case.

The defendants also contend that the Act is unconstitutional because it violates Neb. Const. art. XIII, § 3, which provides: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation . . . ." They cite no authority, but argue it violates this article because it is a "gift." We think this position misconceives the true issue. We have said the purpose of the section is to prevent the state (or any subdivision thereof) from extending its credit to private enterprise. *United Community Services v. The Omaha Nat. Bank, supra.* See *Chase v. County of Douglas, supra.* In the first case cited, the question was whether public utilities districts could make contributions to the united fund. We there held the making of the gifts was a public purpose and did not violate article XIII, § 3, but did violate article VII, § 11, as it then existed. The question is whether the

Act serves a public purpose. We have already held that it does.

If article XIII, § 3, were extended to include "gifts" for public purposes, then all state welfare programs and many others would be unconstitutional. We find no authority which supports the defendants' position with reference to article XIII, § 3.

The holding of the District Court is reversed.

REVERSED.

WILLIAM S. STEPHEN AND DEBRA STEPHEN, APPELLANTS, V. CITY OF LINCOLN ET AL., APPELLEES.

311 N.W.2d 889

Filed October 30, 1981. No. 43490.

1. **Evidence: Appeal and Error.** The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion.
2. **Negligence.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
3. **Evidence: Negligence: Juries.** Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury.
4. **Evidence: Juries.** It is the duty of the trial court to submit to the jury all material issues presented by the pleadings which find support in the evidence adduced.
5. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
6. ——. To test the evidence for a jury question, the trial court must resolve every controverted fact in favor of the party against whom a verdict is sought and give that party the benefit of every inference which can reasonably be drawn from the evidence presented.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Herbert J. Friedman and James E. Dunlevey of Friedman Law Offices for appellants.

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellants, Williams S. Stephen and Debra Stephen, husband and wife, appeal from the jury verdict finding against the Stephens and in favor of the appellee Lawrence G. Olson, a police officer employed by the City of Lincoln. They likewise appeal from a finding made by the District Court of Lancaster County, Nebraska, in favor of the City of Lincoln (City) and against the Stephens in an action simultaneously brought by the Stephens against the City under the provisions of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977), which grew out of the same events giving rise to the suit against Olson. The basis of appellants' appeal is that the trial court erred in sustaining defendants' motion in limine, and in refusing to permit the introduction into evidence by plaintiffs of police department procedural memoranda; in submitting to the jury for its consideration acts of alleged contributory negligence committed by plaintiff William S. Stephen, and in giving to the jury certain instructions, objected to by plaintiffs' counsel, relating to the acts of contributory negligence; and, finally, in overruling plaintiffs' motion for a directed verdict on the question of liability. We believe that the assignments of error are without merit and the judgment of the trial court dismissing the action must be affirmed.

On July 4, 1978, Lawrence Olson was assigned as a cruiser officer patrolling a district which included downtown O Street in Lincoln, Nebraska. At approximately 3:30 p.m. on that afternoon he received a call

from a police dispatcher in response to a burglary alarm on the 6th floor of the Terminal Building located at 9th and O Streets in the City of Lincoln. The traffic on this particular holiday was described as light to moderate. At the time of the dispatch Officer Olson was at 10th and New Hampshire Streets. He activated his red lights, checked to see that they were working, turned on the siren, and proceeded south on 9th Street. Defendant Olson was approximately 3 to 4 blocks from the location of the alarm when he turned off his siren in order not to alert the suspected criminal of his approach, but left his rotating red lights on. As he proceeded southbound on 9th Street he encountered two red traffic signals which he navigated successfully, as his was the only vehicle present. The officer came to a complete stop at the third red light, at 9th and O Streets, and waited for the eastbound and westbound traffic on O Street to stop for him even though it had the green light. After it had stopped, he proceeded to turn onto O Street, reaching a maximum speed of 5 m.p.h. The police cruiser cleared the front end of a westbound vehicle which had stopped for it, at which time defendant Olson saw plaintiff approaching westbound on his motorcycle. Olson testified that Mr. Stephen was not looking directly forward but finally did turn and look at the cruiser, which had come to a complete stop. Stephen swerved violently to the left and hit the front end of the cruiser.

Plaintiff had turned onto O Street at 10th Street and observed the light for 9th and O Streets 1 block to the west to be green. Plaintiff further observed a police car, with red lights flashing, stopped in front of the Terminal Building and all east-west traffic at the intersection that he was approaching stopped in spite of the green light. Plaintiff, however, accelerated through the block up to 30 m.p.h.

The chief of police testified that officers are to follow the "procedure" portion of a document prepared by the police department, entitled "Emergency Calls for

Service." Officer Olson responded to this call using red lights and siren. As he approached 9th and O Streets he turned off the siren, which was in accord with the "procedure."

We turn first to appellants' contention that the trial court erred in not permitting a certain document to be received into evidence. The document offered into evidence by appellants, identified as exhibit B, was entitled "Emergency Calls for Service—Dispatching Procedure, Code Definition, Use of Emergency Equipment, Vehicle Operation." The document consisted of several parts. The first part was entitled "Purpose," and explained the purpose of the document. The second portion was entitled "Discussion," and consisted of an explanation of the problems confronted by an emergency vehicle when answering a call. The third portion was entitled "Authority," and purported to set out the statutory authority for emergency vehicles, first by state statute and then by city ordinance. The last section was entitled "Procedure," and advised the officer as to the actual procedure to be used, depending upon the nature of the call.

Appellants sought to introduce the entire document, including a portion of the discussion section which read as follows: "A review of the complaints received by the Internal Affairs Unit has involved all of the areas discussed, and too, a study submitted by the Fleet Safety Committee has prompted their recommendation that the use of flashing red lights without activating the siren should be prohibited on emergency runs." The record is unclear as to just who makes up the Internal Affairs Unit or the Fleet Safety Committee. The record does, however, establish that this recommendation by the Fleet Safety Committee was not accepted by the police department and was never made a part of the procedure. Appellants sought to offer the entire document in evidence to prove that the officer had violated the department's own procedures by turning off his siren. While it is unclear from the record how omitting

the discussion portion of the procedure prejudiced appellants in view of the fact that the procedural portion was admitted in evidence, it is clear that the trial court did not exceed its discretion in denying to appellants the right to introduce hearsay statements, made by an unidentified group and rejected by the police department, for the purpose of establishing procedures to be followed by the police department.

Unless excepted by some specific provision of law, only relevant evidence is admissible at trial. Neb. Rev. Stat. §§ 27-401 and 27-402 (Reissue 1979). We have frequently had occasion to consider a trial court's refusal to admit irrelevant evidence, saying: "'The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion.

"'Application of this principle has been made to rulings relating to the reception of evidence the admissibility of which turns upon its relevancy, evidence collateral to the main issue, or which bears remotely on issues involved; and to rulings relating to cumulative evidence, opinion evidence, evidence concerning a matter of common knowledge, and evidence which is otherwise competent but is claimed to have a tendency to excite undue prejudice.'" *Westover v. Kerr*, 168 Neb. 494, 498, 96 N.W.2d 421, 424 (1959). See, also, *Duffy v. Physicians Mut. Ins. Co.*, 191 Neb. 233, 214 N.W.2d 471 (1974).

Appellants argue that police department memoranda are relevant and admissible. Under certain circumstances and with proper foundation being laid, we agree with that claim. Such, however, is not the case here. The trial court admitted the relevant portions of the police memoranda into evidence. It was the irrelevant portion which was excluded. Appellants have failed to point out to us, and we are unable to discern on our own, how the rejected statements of a committee whose origin and official capacity is not shown constituted an abuse of

discretion by the trial court. The assignment must be rejected.

Appellants' second assignment of error, to the effect that the trial court erred in submitting acts of contributory negligence by plaintiff to the jury, is likewise unsupported by the record. The trial court instructed the jury that the defendant Olson maintains that plaintiff was contributorily negligent with regard to one or more of certain specific acts, to wit, failing to keep a proper lookout; failing to have his vehicle under reasonable control; failing to yield the right-of-way to an emergency vehicle; traveling at a speed in excess of that reasonable and prudent under the circumstances. In *Wertz v. Lincoln Liberty Life Ins. Co.*, 152 Neb. 451, 457, 41 N.W.2d 740, 744 (1950), we noted from the Restatement of Torts as follows: "'Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, cooperating with the negligence of the defendant in bringing about the plaintiff's harm.'

" . . . 'The plaintiff's contributory negligence may be either

"'(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence of which danger the plaintiff knows or has reason to know, or

"'(b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm.'"

And in *Heinis v. Lawrence*, 160 Neb. 652, 657, 71 N.W.2d 127, 130 (1955), we said: """'Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate

cause.' * * * See Eaton v. Merritt, 135 Neb. 363, 281 N.W. 620. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. * * *"'"

Further, in *Ellingson v. Dobson Brothers Constr. Co.*, 173 Neb. 659, 662, 114 N.W.2d 522, 525 (1962), we said: "'Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury.' Parks v. Metz, 140 Neb. 235, 299 N.W. 643. See, also, Grantham v. Watson Bros. Transp. Co., 142 Neb. 362, 6 N.W.2d 372."

While the instruction did not direct the jury to make any finding regarding the matter of contributory negligence, there was sufficient evidence from which the jury could reach that conclusion. With respect to speed, the testimony was that the speed limit between 9th and 10th on O Street was 25 m.p.h. By deposition, Stephen testified that he had accelerated up to 30 m.p.h. as he approached the accident scene. Accordingly, there was evidence of excessive speed. With regard to the failure to yield the right-of-way to emergency vehicles, the record contains abundant evidence upon which the jury could conclude that the defendant Olson was in fact operating an emergency vehicle and plaintiff failed to yield the right-of-way to it. There was likewise sufficient evidence from which the jury could conclude that plaintiff traveled a full city block in the face of a continuous green light with traffic stopped, thereby knowing something was amiss. There was further testimony that the cruiser could have been observed by plaintiff from his motorcycle in time to stop. From this evidence the jury could have found Stephen guilty of contributory negligence on any one or more of the points claimed and that his contributory negligence was the proximate cause of his injury. It is the duty of the trial court to submit to the jury all material issues presented by the pleadings which find support in the evidence adduced. *Jarosh v. Van Meter*, 171 Neb. 61, 105 N.W.2d

531 (1960). The second assignment of error must likewise be overruled.

We turn then to appellants' final assignment of error, that the trial court erred in failing to direct a verdict in favor of the Stephens on the question of liability. Appellants argue that if a driver fails to see one which is favored over him under the rules of the road he is guilty of negligence as a matter of law, relying upon our decision in *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976). The difficulty with that argument, however, is that under the circumstances in this case Stephen was not the favored vehicle. Quite to the contrary, the police car operating as an emergency vehicle was favored over Stephen. Although Stephen had the green light, if the officer did not disregard the safety of others on the street, the emergency vehicle was given the favored position by reason of state statute and city ordinance. See, Neb. Rev. Stat. §§ 39-608 and 39-640 (Reissue 1978), and Lincoln Municipal Ordinance §§ 10.32.030 and 10.32.031. That being the case, it cannot be said that the officer was liable as a matter of law for having failed to yield to Stephen, who was not entitled to the right-of-way under the circumstances of this case. The trial court would have committed reversible error if it had granted the motion for a directed verdict.

In *Stevens v. Kasik*, 201 Neb. 338, 343, 267 N.W.2d 533, 536 (1978), we said: "The party against whom a motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to a jury. Fangmeyer v. Reinwald, 200 Neb. 120, 263 N.W.2d 428 (1978); Garcia v. Howard, 200 Neb. 57, 262 N.W.2d 190 (1978)."

And in *Krug v. Laughlin*, 208 Neb. 367, 371, 303 N.W.2d 311, 313 (1981), we said: "A trial court should

direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Woodsmall v. Marijo, Inc.*, 206 Neb. 405, 293 N.W.2d 378 (1980); *Foremost Ins. Co. v. Allied Financial Services, Inc.*, 205 Neb. 153, 286 N.W.2d 740 (1980); *Stevens v. Kasik*, 201 Neb. 338, 267 N.W.2d 533 (1978); *Garcia v. Howard*, 200 Neb. 57, 262 N.W.2d 190 (1978); *McCready v. Al Eighmy Dodge*, 197 Neb. 684, 250 N.W.2d 640 (1977).

"To test the evidence for a jury question, the trial court must resolve every controverted fact in favor of the party against whom a verdict is sought and give that party the benefit of every inference which can reasonably be drawn from the evidence presented. *Novotny v. McClintick*, 206 Neb. 99, 291 N.W.2d 252 (1980); *Foremost Ins. Co. v. Allied Financial Services, Inc., supra; Woodsmall v. Marijo, Inc., supra; Simet v. Sage, ante* p. 13, 301 N.W.2d 600 (1981)."

We conclude, therefore, that the assignments of error raised by appellants must be overruled and the action of the trial court in all respects affirmed.

AFFIRMED.

R. REBECCA DONOVAN, APPELLEE, V. JAMES M. DONOVAN, APPELLANT.

311 N.W.2d 895

Filed October 30, 1981. No. 43512.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Chesley S. Baker of Lauritsen, Baker & Brownell for appellant.

Luebs, Dowding, Beltzer, Leininger & Smith for appellee.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and BLUE and CAPORALE, District Judges.

PER CURIAM.

This is an appeal in a proceeding for dissolution of a marriage. The trial court dissolved the marriage and divided the property. The parties had no children as a result of this marriage.

The petitioner wife was awarded title to the residence property subject to a mortgage in the amount of $16,686.40 and a judgment lien in the amount of $7,500 in favor of the respondent husband. The petitioner was also awarded a number of items of personal property, including a 1977 Datsun automobile, lawnmower, garden tiller with snowblower attachment, a 10-speed bicycle, and all other personal property then in her possession. In addition to the judgment lien on the house, the respondent was awarded items of personal property, including a tent, a black and white television set, a 1971 International pickup truck, a 1975 Subaru automobile, a 14-foot Starcraft boat with motor and trailer, ham radio equipment, and all other items then in his possession. The petitioner was allowed $300 attorney fees.

The respondent has appealed and contends the division of the marital property was erroneous. Specifically, the respondent requests an equal division of the equity in the residence property, which he contends had a value of $60,000. The petitioner valued the property at $45,000. On the basis of her value, the respondent was awarded approximately 25 percent of the equity in the property.

The record shows that the lot upon which the house was built was paid for with funds which the petitioner brought into the marriage. Since October of 1975 the petitioner has made all the mortgage payments out of her income, amounting to more than $10,000, and has paid for approximately $2,580 worth of improvements to the house out of her separate income, in

the form of paneling, wallpaper, a central air-conditioning unit, a pressure pump, and other items.

The distribution of property made by the trial court in a proceeding for dissolution of a marriage will not be disturbed in the absence of an abuse of discretion. Under the circumstances of this case, we believe the division made by the trial court was not patently unfair on the record. The judgment is therefore affirmed.

AFFIRMED.

ROBERT A. CRAWFORD, A MINOR, BY AND THROUGH HIS FATHER AND NEXT BEST FRIEND, GILBERT A. CRAWFORD, APPELLANT, V. WILLIAM A. HAM, APPELLEE.

311 N.W.2d 896

Filed October 30, 1981. No. 43537.

1. **Judgments: Appeal and Error.** In reviewing an appeal from the decision of a trail court in a law action, the review is not de novo. The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence.
2. ____: ____. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
3. ____: ____. In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
4. **Negligence: Evidence.** A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Robert C. Wester of Schirber Law Offices, P.C., for appellant.

John P. Miller of Miller & Rowen, P.C., for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and GITNICK, District Judge, and COLWELL, Retired District Judge.

WHITE, J.

This is an appeal from the decision of the trial court in favor of the defendant and dismissing plaintiff's petition for damages for personal injuries resulting from a collision of a bicycle operated by the plaintiff's son, Robert A. Crawford, and a pickup camper operated by the defendant, William A. Ham. The parties waived a jury trial and submitted the cause to the court on the police reports and the depositions of the parties and the witnesses. Plaintiff assigns as error (1) that the decision was contrary to law and the facts, and (2) that the trial court improperly considered evidence of contributory negligence because it was not properly pleaded.

In reviewing an appeal from the decision of a trial court in a law action, the review is not de novo. The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence. *Town & Country Realty of Kearney, Inc. v. Glidden*, 204 Neb. 820, 285 N.W.2d 828 (1979).

In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Aurora Cooperative Elevator Co. v. Larson*, 204 Neb. 755, 285 N.W.2d 498 (1979); *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 298 N.W.2d 773 (1980).

The facts most favorable to the prevailing party would establish that at or about dusk on October 21, 1978, Robert A. Crawford, who was then 13 years of age, had been playing with a companion at a play-

ground in LaVista, Nebraska, near a fire station, when the fire trucks left the station. Robert mounted a bicycle not equipped with lights and pursued the trucks at a fast rate of speed. The companion who had been playing with him also mounted a bicycle and pursued him eastward on Park View Boulevard. The defendant Ham had just emerged from his home at 7809 Park View Boulevard when he first heard the fire sirens and then observed the trucks drive past. He got into his camper truck, turned on the lights, front and rear, and started backing into the street. Defendant looked into the mirrors on each side of the camper truck and into the mirror above the dashboard, through the window of the cab and a glass door on the camper, and observed no one. As he backed into the street, he observed a movement in the right-hand mirror and immediately felt an impact where Robert's bicycle collided with the left rear of the camper. Shortly before the accident, Robert's companion had yelled to him and Robert had turned his head to look back and almost immediately collided with the camper.

Plaintiff suggests that since all evidence was in written form in the District Court, the reviewing court should review the case de novo uninfluenced by the decision of the trial court. He cites *State Farm Mut. Auto. Ins. Co. v. Budd*, 185 Neb. 343, 175 N.W.2d 621 (1970), in support of his contentions. In that case, the dispute arose out of the issue of the statute of limitations raised in an answer and the plaintiff's assertion in a reply that the defendant was equitably estopped from raising that defense. The evidence consisted entirely of correspondence and stipulations of the parties. This court's holding was that since it was in as good a position to weigh the facts as was the trial court, it would do so. However, the court also held that the decision on the submitted materials was "a question of law" and there were no disputed facts. Obviously, that is not the case here.

There were disputes in the deposition testimony of the parties and the witnesses, and the question was factual and not of law.

In any event, if the holding of *State Farm Mut. Auto. Ins. Co. v. Budd, supra,* was ever the law of this state, we would limit it to its specific facts. This court does not intend to change the standard of review in law actions. The standard of review will remain the same, and in a law action tried to the court without a jury the findings of the court have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *McDowell Road Associates v. Barnes,* 198 Neb. 207, 252 N.W.2d 151 (1977). The evidence in the case before us supports the findings of fact, and the judgment of the trial court was not clearly wrong. The first assignment of error is not meritorious.

By the second assignment of error, the plaintiff seems to assert that the trial court could not consider evidence of contributory negligence. In his answer, the defendant Ham alleged that the negligence of Robert was the proximate cause of Robert's injuries. The plaintiff did not move the court for specifications of the negligence and raised the issue for the first time on his motion for new trial. The plaintiff cites no authority and, indeed, there is none. The rule in this state remains that "a general allegation of negligence is good against a demurrer, *and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant.*" (Emphasis supplied.) *Chicago, R.I. & P.R. Co. v. O'Donnell,* 72 Neb. 900, 905, 101 N.W. 1009, 1010 (1904); *Bunselmeyer v. Hill,* 179 Neb. 140, 137 N.W.2d 354 (1965); *Behrens v. Gottula,* 160 Neb. 103, 69 N.W.2d 384 (1955). The assignment is without merit.

AFFIRMED.

DANIEL R. DRAWBRIDGE AND CYNTHIA MISTEREK, APPELLEES, V. DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.

311 N.W.2d 898

Filed October 30, 1981. No. 43558.

1. **Highways: Negligence.** One who places an obstruction upon a highway in such a manner that it is dangerous to others using the highway has a duty to remove the obstruction or to use due care to warn others upon the highway of the danger incident to the obstruction.
2. ____: ____. A failure to so warn the traveling public is continuing negligence as distinguished from a condition.
3. **Motor Vehicles: Negligence.** The duty of a guest riding in an automobile is to use due care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. A guest is not required to use the same degree of care as devolves upon the driver. If a guest perceives danger, or should anticipate danger, he should warn the driver. Ordinarily a guest need not watch the road or advise the driver in the management of the car.
4. ____: ____. A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill.
5. ____: ____. Generally, it is negligence as a matter of law to drive so fast at night that the driver is unable to stop in time to avoid a collision with an object on the road which is within the range of his headlights.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Judgment in Drawbridge v. Douglas County affirmed. Cause in Misterek v. Douglas County remanded with directions.

Donald L. Knowles, Douglas County Attorney, and Jerry W. Katskee for appellants.

Ronald H. Stave of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

These cases were actions under the Nebraska Political Subdivisions Tort Claims Act against the County of Douglas, Nebraska, and James Paulison, a deputy sheriff employed by the county. They were consolidated for trial in the District Court and docketed as a single appeal in this court.

The plaintiffs were passengers in an automobile operated by Douglas Misterek when it collided with the rear of an automobile owned by Frank Vencil at approximately 12:45 a.m. on March 4, 1978. These actions were brought to recover the damages resulting from the injuries to the plaintiffs in the collision. Douglas Misterek assigned his cause of action arising out of the accident to his wife, Cynthia, and it was included in the action commenced by her.

The plaintiffs, the driver Misterek, and Kathleen Warren, plaintiff Drawbridge's companion for the evening, were returning to Omaha from LeShara after dinner and drinks in LeShara, Nebraska.

The plaintiff Daniel R. Drawbridge was riding in the rear seat of the Misterek automobile. The plaintiff Cynthia G. Misterek was riding in the front seat of the Misterek automobile. Both plaintiffs were injured in the collision.

The Vencil automobile had been involved in a collision with an automobile operated by Mark Hannan at approximately 11:30 p.m. that same night. After the collision with the Hannan automobile the Vencil automobile came to rest on the south side of the highway headed slightly southeast, with the rear end of the automobile partly on the pavement and partly on the shoulder of the highway. The evidence is in conflict as to the exact position and location of the Vencil automobile at the time it was struck by the Misterek automobile.

The collision between the Misterek automobile and the Vencil automobile occurred on Highway 64 approximately 1 mile east of the Platte River bridge. At that point the highway is level and runs generally east and

west. It is a two-lane paved highway. At the time of the accident the sky was overcast but there was no precipitation. The evidence is in conflict as to the condition of the surface of the highway, but it was described in the evidence as ice-covered, snowpacked, or basically dry.

At the time of the accident the Hannan automobile was stopped on the north shoulder of the highway, a short distance west of the Vencil automobile. A patrol vehicle operated by Paulison was parked behind the Hannan automobile. The headlights, four-way flasher lights, and the rotating lights on the top of the patrol vehicle were turned on and operating. Paulison also testified that the spotlight on the patrol vehicle was turned on and shining across the road in the direction of the Vencil automobile. There were no lights on the Vencil automobile at the time of the accident.

As the plaintiffs' car came over a small hill onto the flat stretch of road about ¾ to 1 mile west of the collision site, the plaintiffs and the driver testified that they noticed the rotating cruiser lights on the north side of the highway. The passengers in the Misterek vehicle, which was eastbound, testified that they saw no warning lights except the rotating lights on top of the cruiser.

Douglas Misterek, the driver, testified that he alternated between watching the activity on the north side of the highway and watching the entire road. Plaintiff Cynthia Misterek testified that her attention was mainly focused on the north side of the road until they passed the cruiser, and at that time she looked ahead and saw the Vencil vehicle about two to three car lengths away, at least half in the driving lane. Plaintiff Drawbridge also testified that the Vencil car was at least half on the roadway. Douglas Misterek's testimony was that the entire rear of the Vencil vehicle was in the driving lane.

Misterek further testified that he had reduced his speed to approximately 30 miles per hour or less as he approached the scene of the accident. He did not see the

Vencil automobile until it was about two car lengths away.

The trial court found generally for the plaintiffs and awarded the plaintiff Drawbridge damages in the amount of $1,750. The plaintiff Misterek was awarded damages in the amount of $2,750.

The defendants have appealed and contend the trial court erred in finding that defendant Paulison was negligent; in failing to find the negligence of Douglas Misterek was the sole proximate cause of the accident; in failing to find the plaintiffs' recovery was barred by contributory negligence and assumption of risk; and in not separating the damages awarded to Cynthia Misterek from those awarded to Douglas Misterek.

The petition alleged the defendant Paulison was negligent in failing to remove the Vencil automobile from the highway and in failing to warn oncoming traffic of the presence of the Vencil automobile on the highway.

The evidence is undisputed that the Vencil automobile was inoperable and that Paulison had ordered a tow truck shortly after he had arrived at the scene of the accident. There is no evidence which would sustain a finding that Paulison was negligent in failing to remove the Vencil automobile from the highway.

As to the alleged failure to warn, there was evidence that the Vencil car was dark in color, and the accident scene was unlighted except for the lights on the patrol vehicle which was parked on the shoulder on the north side of the highway several car lengths west of the Vencil automobile. Flares were available at the sheriff's office but there were none in the patrol vehicle operated by Paulison.

In *Johnson v. Metropolitan Utilities Dist.*, 176 Neb. 276, 280, 125 N.W.2d 708, 710 (1964), we said: "One who places an obstruction upon a highway in such a manner that it is dangerous to others using the highway has a duty to remove the obstruction or to use due care to warn others upon the highway of the danger incident to

the obstruction." A failure to so warn the traveling public is continuing negligence as distinguished from a condition. Although Paulison did not place the Vencil automobile upon the highway, he was present at the scene of the accident and was in charge of the situation. The trial court could find, under the facts and circumstances in this case, that he failed to use due care to warn approaching traffic that the eastbound lane of the highway was obstructed.

So far as contributory negligence and assumption of risk by the passengers are concerned, the defendants contend the plaintiffs failed to keep an adequate lookout, warn the driver of impending danger, and rode with a driver who they knew or should have known was unable to operate the vehicle with proper prudence or care.

The plaintiff Misterek, riding in the right front seat, testified that she was mostly watching the north side of the road until they were past the cruiser, and then turned her attention to the road in front of her. The plaintiff Drawbridge was seated in the right rear seat and was watching what he could see from that position. The plaintiff Misterek also testified that she uttered "a warning" as soon as she saw the Vencil vehicle, at about two to three car lengths away.

The duty of a guest riding in an automobile is to use due care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. A guest is not required to use the same degree of care as devolves upon the driver. If a guest perceives danger, or should anticipate danger, he should warn the driver. Ordinarily a guest need not watch the road or advise the driver in the management of the car. *Kuska v. Nichols Construction Co.*, 154 Neb. 580, 48 N.W.2d 682 (1951). The trial court could have found that plaintiffs were not negligent in this respect.

The defendants' major contention is that the plaintiffs were contributorily negligent in riding or continuing to ride with Douglas Misterek knowing that he was "intoxicated." Misterek had consumed about four bottles of

beer between 8 p.m. and midnight on the night of the collision, and had eaten a full meal, as had the other parties in his vehicle, during the same period of time. All parties involved testified that Misterek appeared sober and in control of his driving. Neither Paulison nor Deputy Sheriff Timmins testified that they suspected Misterek of intoxication. There was no evidence of blood or breath tests.

A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. Knowledge that the driver has been drinking does not necessarily bar recovery by a guest. *Schaffer v. Bolz*, 181 Neb. 509, 149 N.W.2d 334 (1967). Where the driver is really and perceptibly under the influence of liquor and actual ascertainable intoxication exists to such a degree that the guest is charged with knowledge of it, his recovery will be barred. There was no evidence that Misterek was in such a state of intoxication, and both plaintiffs testified affirmatively that he was not. The trial court could have found that the plaintiffs were not contributorily negligent with regard to the "intoxication" issue and did not assume the risk.

Although the evidence did not establish that the negligence of Douglas Misterek was the sole proximate cause of the accident, the evidence did establish negligence on his part which was more than slight and sufficient to bar his recovery as a matter of law. Generally, it is negligence as a matter of law to drive so fast at night that the driver is unable to stop in time to avoid a collision with an object on the road which is within the range of his headlights. *McClellen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973). Although the Vencil automobile was maroon in color and unlighted, and there was some evidence it was dirty, there was an additional circumstance in this case which required Misterek to exercise greater care in approach-

ing the scene of the accident. Misterek had observed the flashing lights on the patrol car for approximately a mile and had reduced his speed because he was aware that some type of an emergency situation might have occurred on the highway. Under these circumstances, his failure to see the Vencil vehicle, which he claimed was directly in front of him, was sufficient negligence to bar his recovery as a matter of law.

Since the trial court did not separate the damages awarded in the Cynthia Misterek action, it is necessary to remand that action for further findings with directions to reduce the award by the amount of damages, if any, which were awarded by reason of the cause of action assigned by Douglas Misterek.

The judgment of the District Court in the action brought by Daniel Drawbridge is affirmed. The action brought by Cynthia Misterek is remanded to the District Court for further proceedings in accordance with this opinion.

JUDGMENT IN DRAWBRIDGE V. DOUGLAS COUNTY AFFIRMED.

CAUSE IN MISTEREK V. DOUGLAS COUNTY REMANDED WITH DIRECTIONS.

IN RE ESTATE OF ESSIE E. SCHOCH, DECEASED. COMMERCIAL NATIONAL BANK AND TRUST COMPANY OF GRAND ISLAND, NEBRASKA, APPELLEE, V. DAISY R. KAIL, APPELLANT.

311 N.W.2d 903

Filed October 30, 1981. No. 43593.

1. **Judgments: Appeal and Error.** On appeal of an action at law in which a jury has been waived, the findings and judgment of the District Court as the trier of the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support them and they are not clearly wrong.

2. **Estates: Wills.** One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty.
3. ____:____. Testamentary capacity is tested by the state of a testator's mind at the time he executes his will.
4. ____:____. Although competent evidence of a testator's condition of mind long before, closely approaching, and shortly after the execution of a will is admissible, it is received only to assist in revealing his state of mind at the time the will was executed.
5. **Estates: Wills: Proof.** It is the duty of the proponent of a will, in the first instance, to make a prima facie case as to testamentary capacity; it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of proving testamentary capacity by a preponderance of the evidence devolves upon the proponent.
6. **Trial: Evidence.** A trial court has broad discretion to exclude cumulative evidence.
7. **Hearsay: Proof.** Under the residual hearsay exception found in Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1979), the proponent of the evidence has the burden of establishing each of the conditions of admissibility imposed by the rule.
8. **Trial: Witnesses.** The unexplained failure of a party to call or examine an available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party.
9. ____:____. The relative convincing powers of the inferences to be drawn from failing to call or examine a witness and other evidence are for the determination of the trier of fact.
10. **Judgments: Appeal and Error.** In determining the sufficiency of the evidence to sustain the trial court's judgment in an action at law in which a jury has been waived, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and that party must have the benefit of every inference that can reasonably be deduced therefrom.

Appeal from the District Court for York County: WILLIAM H. NORTON, Judge. Affirmed.

C. Russell Mattson of Mattson, Ricketts, Davies, Stewart, Calkins & Duxbury for appellant.

R. P. Cathcart of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellee.

Heard before WHITE and HASTINGS, JJ., and RIST and CAPORALE, District Judges, and RONIN, Retired District Judge.

CAPORALE, District Judge.

The appellant urges that the District Court erred when it affirmed the judgment of the county court and adjudged that her sister's last will and testament be admitted to probate. We affirm the findings and judgment of the District Court.

This is an action at law which, under the procedures existing at that time, was triable to a jury on appeal from the county court to the District Court. See Neb. Rev. Stat. §§ 25-1104, 30-1601, and 30-1606 (Reissue 1979). The parties elected to waive a jury. Accordingly, on this appeal, the findings and judgment of the District Court as the trier of the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support them and they are not clearly wrong. *Koperski v. Husker Dodge, Inc.* 208 Neb. 29, 302 N.W.2d 655 (1981); *In re Estate of Bouma*, 206 Neb. 209, 292 N.W.2d 37 (1980).

One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty. *Anderson v. Claussen*, 196 Neb. 787, 246 N.W.2d 586 (1976); *Holman v. Morrison*, 186 Neb. 159, 181 N.W.2d 441 (1970). Such capacity is tested by the state of a testator's mind at the time he executes his will. *Thomas v. Vaughan*, 181 Neb. 673, 150 N.W.2d 241 (1967). Although competent evidence of a testator's condition of mind long before, closely approaching, and shortly after the execution of a will is admissible, it is received only to assist in revealing his state of mind at the time the will was executed. *In re Estate of Woodward*, 147 Neb. 270, 23 N.W.2d 75 (1946).

It is the duty of the proponent of a will, in the first instance, to make a prima facie case as to testamentary capacity; it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of proving testamentary capacity

by a preponderance of the evidence devolves upon the proponent. *Moore v. Moore*, 158 Neb. 620, 64 N.W.2d 301 (1954); *In re Estate of Wahl*, 151 Neb. 812, 39 N.W.2d 783 (1949).

We review the appellant's assignments of error in light of the above-stated scope of review and rules relating to testamentary capacity and its proof. She asserts the following errors resulted in the erroneous finding that testatrix possessed the requisite capacity and the adjudication that the will be admitted to probate: (1) The admission into evidence of certain opinion evidence concerning mental competence; (2) The exclusion of certain hearsay evidence; and (3) The failure to give weight to inferences drawable from appellee's failure to call certain witnesses and to ask concerning testamentary capacity of a witness who did testify.

The will was executed August 1, 1968, and devised the major portion of the decedent's estate to her husband, if he survived; if not, to her and his nieces and nephews. The decedent's husband did not survive her.

The appellee, Commercial National Bank and Trust Company of Grand Island, Nebraska, as successor personal representative and proponent of the will, made a prima facie case on the issue of testamentary capacity. The attorney who drafted the will and acted as an attesting witness testified that on the date in question the testatrix possessed testamentary capacity. Thereafter, the appellant adduced evidence, as the contestant, that at various times before, closely approaching, and shortly after the will was executed, the decedent was markedly confused, unkempt, uncommunicative, and dressed inappropriately. There was medical evidence that the decedent suffered from chronic brain syndrome and was markedly senile. One physician testified that, in his opinion, if confusion in such persons is continuous, as was the case here so far as he was concerned, the mental

state is not variable. Another physician, on the other hand, opined that the mental condition of such persons can vary at different times from confused to clear.

In rebuttal, the proponent adduced testimony which contradicted that of the contestant on the questions of decedent's confusion, grooming, communicativeness, and manner of dress. One such witness, who testified to a number of transactions he had had with the decedent at various times, at one point stated he did not know whether the decedent knew and understood the will's provisions on the day she signed it. Subsequently, he was allowed to testify, over objection that the question had been asked and answered and proper foundation was lacking, that decedent was competent in August 1968. Although there may have been no foundation for an opinion as to decedent's testamentary capacity on the day the will was executed, that was not the question. The witness had testified as to an agreement decedent had entered into on August 15, 1968, and thus there was foundation for an opinion as to competency in August 1968 generally. Thus, appellant's first assignment of error is without merit.

The trial court excluded certain hearsay offered by the appellant, consisting of statements concerning decedent's mental state attributed to her dead husband and descriptions of testatrix's behavior imputed to one of her dead friends. Hearsay is not admissible, except under certain exceptions. Neb. Rev. Stat. § 27-802 (Reissue 1979). The hearsay statement of an unavailable declarant is not excluded, provided its probative value is not substantially outweighed by the factors enumerated in Neb. Rev. Stat. § 27-403 (Reissue 1979), even though not covered by specific exceptions, if there are equivalent circumstantial guarantees of trustworthiness as underlie the specific exceptions, and if "(i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure

through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1979).

First, it should be noted that the trial court has broad discretion to exclude cumulative evidence. *Anson v. Fletcher*, 192 Neb. 317, 220 N.W.2d 371 (1974). Under the state of the record it could not be said that exclusion of the evidence offered would have constituted reversible error even if otherwise admissible. Secondly, the trial court was correct in excluding the hearsay which was offered, and therefore appellant's second assignment of error fails. In considering the residual exception found in the federal rule from which our statute is derived, Fed. R. Evid. 804(b)(5) (1975), the court in *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979), first observed the trial court had a considerable measure of discretion in applying the exception. It then ruled that the proponent of the evidence had the burden of establishing each of the conditions of admissibility imposed by the rule. There is no showing here that the hearsay statements offered had any of the circumstantial guarantees of trustworthiness found in the specific exceptions. The reliability of the witness' testimony that the hearsay statement was in fact made is not a factor to be considered in deciding its admissibility. It is the circumstantial guarantees of trustworthiness of the speaker of the words at the time the utterances were made which control. *Huff v. White Motor Corp., supra.* No showing of the special trustworthiness of the deceased husband's comments at various times that the testatrix could no longer cope, could not be left at home, would not be able to help in the contest of another's will, and would forget having been away from home is made by the record. A variety of causes unrelated to the reasons contained in the hearsay may have existed.

The statements attributed to the dead friend concerning the testatrix's behavior were not shown to be more probative on the point for which offered than other evidence which could have been procured by reasonable effort. Nor was there any showing that the hearsay would serve the interests of justice by increasing the likelihood that the truth would be ascertained. The residual hearsay exceptions are to be used very rarely, and only in exceptional circumstances. *Huff v. White Motor Corp., supra; Wolfson v. Mutual Life Ins. Co. of New York*, 455 F. Supp. 82 (M.D. Pa. 1978). Such exceptional circumstances were not shown to exist in this case.

We now consider appellant's last assignment of error. The second attesting witness to the will was not called as a witness. A witness who had been identified by the proponent of the will as one who knew of testatrix's testamentary capacity on August 1, 1968, was called and did testify, but was not asked his opinion about testatrix's capacity on the day in question.

It is true, as argued by appellee, that the unexplained failure of a party to call or examine an available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party. *Dunbier v. Stanton*, 170 Neb. 541, 103 N.W.2d 797 (1960); *Medelman v. Stanton-Pilger Drainage Dist.*, 155 Neb. 518, 52 N.W.2d 328 (1952). It is likewise true, however, that the relative convincing powers of the inferences to be drawn from failing to call or examine a witness and other evidence are for the determination of the trier of fact. *Dunbier v. Stanton, supra.* In determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and that party must have the benefit of every inference that can reasonably be deduced therefrom. *Urban-*

ovsky v. Foral, 191 Neb. 308, 215 N.W.2d 74 (1974); *McBride v. Fort Kearney Hotel, Inc.*, 185 Neb. 518, 176 N.W.2d 911 (1970).

A review of this record in light of the foregoing rules compels the conclusion that appellant's third assignment of error is likewise without merit, and that there is ample evidence to sustain the trial court's finding that the testatrix had testamentary capacity when she executed her will.

For the reasons stated, the judgment that the will be admitted to probate is affirmed.

AFFIRMED.

B TOWN, INC., A NEBRASKA CORPORATION, APPELLEE, V. CHET ALBRIGHT AND STEVE H. ALBRIGHT, DOING BUSINESS AS SINGER SEWING MACHINE SHOP, APPELLANTS.

311 N.W.2d 908

Filed October 30, 1981. No. 43634.

1. **Judgments: Appeal and Error.** In determining whether the evidence supports the findings of the trial court in an action at law where the jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in its favor, and that party is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. ____: ____. The judgment of the trial court in an action at law where the jury has been waived has the effect of a verdict of the jury, and it will not be set aside on appeal unless clearly wrong.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Charles W. Balsiger for appellants.

Gary G. Thompson of Hubka, Kraviec & Thompson for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and GITNICK, District Judge, and COLWELL, Retired District Judge.

GITNICK, District Judge.

This is an action by the plaintiff-appellee, B Town, Inc., a Nebraska corporation, to recover rents, utility payments and garbage collection charges, and costs for other than usual repairs for the balance of the term of a written lease, after the defendants-appellants, Chet Albright and Steve H. Albright, doing business as Singer Sewing Machine Shop, had voluntarily vacated the premises. A jury was waived and the case was tried on a series of exhibits stipulated into evidence by the parties. The District Court found for the plaintiff and against the defendants for the sum of $6,118.91, plus interest and costs. The defendants have appealed.

The plaintiff was the owner of a building in the city of Beatrice, Nebraska, which comprised several commercial areas, one of which was leased to the defendants under the terms of a 3-year lease which commenced on December 1, 1978, at a monthly rental of $300, plus prorated utility charges and garbage collection services. On July 19, 1979, defendants gave notice of their intent to vacate the premises, effective July 31, 1979. Subsequently, plaintiff was able to relet the premises for a reduced monthly rental of $100, commencing September 1, 1979.

The defendants complain of the judgment rendered against them for two reasons. They argue that an ambiguity exists in the lease prepared by the landlord, which they argue must be construed against the landlord and which excuses the defendants from payment responsibility. Secondly, the defendants contend, in substance, that the subsequent reletting of the entirety of the building makes the defendants liable, if at all, for a lesser rental than found to be due by the trial court, which computed the rental to be due only on the rent attributable to the portion of the building originally leased to the defendants, reduced by the rental received on reletting. These contentions were resolved by the trial court and decided adversely to the defendants. We affirm the judgment of the trial court.

The pertinent provision of the lease which is in dispute reads as follows: "15. LIABILITY: 'Lessor' hereby agrees and releases the 'Lessee' harmless from and against loss, damage or liability occasioned by or growing out of or arising or resulting from any default hereunder, or any tortuous [sic] or negligent act on the part of the 'Lessor', 'Lessor's' agents, or employees."

Needless to say, the foregoing lease paragraph is not a model of grammatical lucidity. However, this court has long held that in the construction of the language of written instruments, including leases, every effort should be made to harmonize the language which presents the difficulty with the other provisions of the instrument, if that can be accomplished by the use of recognized and reasonable rules of construction.

The purpose of rules of construction are to arrive at and give effect to the intention of the parties from a review of the entire instrument, rather than to select particular words for the purpose of interpreting a particular provision. Leases are construed from the four corners of the instrument to arrive at the true intention of the parties. See, Neb. Rev. Stat. § 76-205 (Reissue 1976); *Omaha Country Club v. Dworak*, 186 Neb. 336, 183 N.W.2d 264 (1971).

The defendants' contention is that the "hold harmless" provision of paragraph 15 of the lease, as set forth, avoids the responsibility to pay rental or any related charges imposed by the lease. Defendants overlook the concise statements of the lease with regard to the payment of rent, in paragraph 3, and to the payment of utilities and common area maintenance charges, in paragraph 14, which are clear. Defendants further overlook the applicability of paragraph 17, which deals expressly with the event of default in the payment of rental or the failure to perform any of the covenants, agreements, or obligations of the lease, and gives to the landlord the right to sue for the difference between the rental reserved under the lease for the unexpired portion of the term and any lesser sum which the

landlord obtains in reletting the premises for the remainder of the lease term. This provision is more specific in content than the general provisions of paragraph 15 relating to default, and must control.

To adopt the defendants' contention would be to release the lessee from all obligations imposed on the tenant by the terms of the lease when the act of default is caused by the lessee. The defendants' contention is a convoluted interpretation of a paragraph which, while admittedly inartfully drawn, nevertheless should not be the basis for voiding what is otherwise a clear statement of the responsibilities imposed on each of the parties by the other provisions of the lease. A construction leading to an absurd, harsh, or unreasonable result should be avoided, if possible. 51C C.J.S. *Landlord and Tenant* § 232(4) (1968).

Defendants' further contention that the trial court erred in the assessment of damages by not giving proper consideration to the overall rental received from the reletting of the entire building of which the demised premises are a part, at the time of the vacation of the demised premises by the lessee, is without merit. The defendants did not allege and offered no evidence pertaining to any question of fraud in reletting the demised premises for less than fair market rental. The defendants' contention was resolved against them on a factual basis by the trial court, based upon the evidence which was introduced by stipulation. The defendants will not now be heard to complain of their lack of evidence necessary to support their contention.

The defendants are entitled only to a credit against the rental liability for the amount of rental received by the lessor for the premises formerly occupied by them, and subsequently relet by the lessor, from the date of reletting. This they received.

In the case in controversy, a jury trial was waived and trial was to the court. In determining whether the evidence supports the findings of the trial court in an action at law where the jury has been waived, the

evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in its favor, and that party is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Aurora Cooperative Elevator Co. v. Larson*, 204 Neb. 755, 285 N.W.2d 498 (1979).

The judgment of the trial court in an action at law where the jury has been waived has the effect of a verdict of the jury, and it will not be set aside on appeal unless clearly wrong. *Tibbs v. Fisher*, 208 Neb. 306, 303 N.W.2d 293 (1981).

The evidence here supports the findings and judgment of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BURLEY C. COLEMAN, APPELLANT.

311 N.W.2d 911

Filed October 30, 1981. No. 43839.

1. **Indictments and Informations: Appeal and Error.** An information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted.
2. **Indictments and Informations.** A complaint or information is fatally defective only if its allegations can be true and still not charge a crime.
3. **Indictments and Informations: Waiver.** The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Burley C. Coleman, appeals from a judgment and order of the District Court for Douglas County, Nebraska, finding him guilty of attempted robbery and sentencing him to a term of 5 to 7 years in the Nebraska Penal and Correctional Complex. In seeking reversal of his conviction Coleman claimed that the amended information to which he entered a plea of nolo contendere failed to charge him with all of the essential statutory elements of attempted robbery and was therefore fatally defective.

Coleman's argument is indeed ingenious, and if the appeal is examined in a vacuum, as counsel would have us do, one might reach the conclusion urged by Coleman. An appeal of this nature, however, is not to be examined in a vacuum, but rather in light of all of the filings and proceedings in the case. When that is done it becomes apparent that the claim is without merit and must be rejected and the judgment and sentence affirmed.

Coleman was originally charged in a four-count information. Count I charged that on December 21, 1979, Coleman "did then and there forcibly, and by violence or by putting in fear, take money from Christine Daluge, with the intent to steal." Count II claimed that he used a firearm to commit the felony described in count I. Count III charged that on December 21, 1979, Coleman "did then and there attempt to forcibly and by violence, or by putting in fear, attempt to take money from *McDonald's Restaurant* with the intent to steal." (Emphasis supplied.) Count IV charged Coleman with using a firearm to commit the felony set out in count III. A preliminary hearing was held in the municipal court for the city of Omaha and Coleman was bound over to the District Court for Douglas County on all four counts.

In the District Court Coleman filed a plea in abatement, maintaining that the evidence in the municipal court was insufficient to support a finding of probable cause to believe that a crime was committed. Based upon a review of the entire record made in the municipal court, the trial court overruled the plea in abatement. Thereafter, on July 16, 1980, Coleman appeared in the District Court with his attorney and, pursuant to a plea bargain, entered a plea of nolo contendere to a single count of robbery, the State agreeing to dismiss the other charges. For reasons which the record does not disclose, counts I, II, and IV were dismissed and count III was retained as the count to which Coleman entered his plea of nolo contendere. Count III charged that Coleman did, on December 21st, "forcibly and by violence, or by putting in fear, attempt to take money from McDonald's Restaurant with the intent to steal." It is by reason of that amended information to which Coleman entered a plea of nolo contendere that he now contends the charges should be dismissed. His argument is simply that the amended information fails to set out all of the essential elements of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1979), in that the information fails to disclose the name of the person against whom the crime was committed. Under the provisions of the Nebraska robbery statute, § 28-324, a person commits robbery if, (1) with the intent to steal, (2) he forcibly and by violence, or by putting in fear, (3) takes from the person of another any money or personal property of any value whatever.

Coleman argues that because the amended complaint contained only the name "McDonald's Restaurant" and not the employee's name, one of the essential elements of the crime of robbery was omitted and the complaint is fatally defective to the extent that a subsequent plea does not constitute a waiver. While it is true, as urged by Coleman, that we have held that defects or omissions in the indictment or information which are of such a fundamental character as to make the indictment

wholly invalid are not subject to waiver (see *In re Interest of Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980)), we have further held that an information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted. See, *State v. Lingle*, *ante* p. 492, 308 N.W.2d 531 (1981); *State v. Haile*, 185 Neb. 421, 176 N.W.2d 232 (1970).

We have also previously pointed out the difference between a fundamental defect in an information which may not be waived and a mere technical defect which is waived by a plea. In *Nelson v. State*, 167 Neb. 575, 581, 94 N.W.2d 1, 5 (1959), we said: "'It is the general rule that defects or omissions in the indictment or in the mode of finding the indictment, which are of such a fundamental character as to make the indictment wholly invalid, are not subject to waiver by the accused. * * * But it is equally the general rule that defects and omissions which run only to the form in which the various elements of the offense are stated, or to the fact that the pleading is [inartfully] drawn, are waived by not objecting thereto in some appropriate manner in the preliminary stages of the proceeding, or, as to some matters, before determination of the issue on the merits.'"

We have also held that a complaint or information is fatally defective only if its allegations can be true and still not charge a crime. See *Phillips v. State*, 154 Neb. 790, 49 N.W.2d 698 (1951). Either the omission of the employee's name was a defect apparent on the face of the complaint or the insertion of the name "McDonald's Restaurant," absent further extrinsic evidence, was sufficient to allege the charge of robbery.

If the defect was apparent on its face, the appropriate manner to attack the amended complaint would have been by a motion to quash. Neb. Rev. Stat. § 29-1808 (Reissue 1979) provides: "A motion to quash may be made in all cases when there is a defect apparent

upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." The effect of failing to object, as provided for in § 29-1808, is as provided for by Neb. Rev. Stat. § 29-1812 (Reissue 1979) which states: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue." See, also, *State v. Workman*, 186 Neb. 467, 183 N.W.2d 911 (1971). Coleman's plea of nolo contendere to the amended charge was the equivalent of a plea of guilty and as such waives every defense to the charge, whether the defense is procedural, statutory, or constitutional. See *State v. Country*, 202 Neb. 509, 276 N.W.2d 110 (1979).

On the other hand, the name "McDonald's Restaurant," absent other evidence, does not on its face reveal that "McDonald's Restaurant" is not the name of a person but, rather, is the name of a corporation. To make that determination we must resort to other evidence in the record, including the arraignment and plea hearing. Once we do that, it is apparent the defect is not a fundamental defect which could not be waived by a plea.

The original information filed in this case clearly set out all of the necessary elements and, in the various counts, advised Coleman of the charges against him. Following his entry of a plea of nolo contendere, the record made in both the municipal court and District Court clearly establishes that all the facts necessary to sustain the conviction resulting from Coleman's plea, including the name of the employee of McDonald's Restaurant, were made known to Coleman. He was not in any manner misled or ill-advised as to the nature of the charge. The use of the term "McDonald's Restaurant" may have been inartful, but it was not so defective as to render the conviction void. It was clear that the money was taken from an employee of McDonald's Restaurant and not from an inanimate cor-

poration, and Coleman was aware of these facts before he entered his plea. We believe that when the entire record is examined, including the original information and the evidence presented at the hearing, there is not a fatal defect of the type that could not be waived by entering a plea. Coleman, by entering the plea, waived any such defect which may have existed. The conviction and sentence of the trial court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BURL HOLLOMAN, APPELLANT.

311 N.W.2d 914

Filed October 30, 1981. No. 44110.

1. **Criminal Trials: Effectiveness of Counsel.** Where one maintains that counsel was inadequate, one must likewise show how or in what manner that alleged inadequacy prejudiced one.
2. **Post Conviction: Effectiveness of Counsel: Proof.** In post conviction relief cases the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence.
3. **Post Conviction: Proof.** In a post conviction proceeding the burden of proof is on the movant to establish a basis for relief, and where such burden is not met a denial of that requested relief is required.
4. **Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine plausibility of explanations, or weight evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

J. David Thurber of John R. Doyle Law Offices for appellant.

Paul L. Douglas, Attorney General, and Lynne Fritz for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Burl Holloman, appeals from an order entered by the District Court for Douglas County, Nebraska, denying him post conviction relief sought pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). The basis for his claim was that he had been denied effective assistance of court-appointed counsel during his trial on the merits. Specifically, Holloman claimed that his trial counsel failed to adequately represent him in that he failed to interview a known alibi witness and failed to call the witness at trial. He also alleged that his trial counsel failed to investigate the scene of the crime and Holloman's home. Following an evidentiary hearing the trial court found that Holloman's claims of inadequate counsel were without merit and denied post conviction relief. We have now examined the record in this matter and agree with the trial court. For that reason we affirm the judgment of the trial court denying post conviction relief.

Holloman was convicted by a jury of the forcible rape and robbery of a 76-year-old woman who lived in a house next to where Holloman lived. Holloman appealed that conviction to this court and we affirmed the conviction. See *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976). The facts of the case are adequately set out in our previous opinion and need not be repeated here except as is specifically necessary to decide this appeal.

The record in *Holloman, supra*, discloses that someone identified by the prosecutrix on three separate occasions as Holloman broke into her home at approximately 6:30 a.m. The assailant then forcibly raped the victim and afterwards robbed her of $20.

The victim identified Holloman as her assailant from photographs shown to her by the police, as well as at a police lineup and an in-court identification. When she reported the crime she advised the officers that her assailant was wearing a blue sweater at the time she

was attacked, and the evidence discloses that the assailant was wearing a shoe with a distinctive heel which left an impression on the damp fresh ground outside the victim's home. When Holloman was arrested the arresting officers observed a blue sweater on a chair next to Holloman's bed, which was seized and offered in evidence at trial. The officers also testified that they observed Holloman's shoes lying on the floor next to his bed. The shoes likewise were seized and offered as evidence in the trial. The heel prints matched those found on the ground outside the victim's home.

Holloman now argues as his first basis for post conviction relief that his court-appointed counsel inadequately represented him, in that counsel did not personally inspect either the home of the victim or Holloman's home so that he could have cross-examined both the victim concerning the attack and the arresting officers as to the location of the sweater and shoes which were seized.

The difficulty, however, with Holloman's argument is that, while Holloman suggests that counsel failed to adequately perform by not personally investigating the victim's home and Holloman's home, he fails to point out to us how such investigation would have in any manner disclosed evidence which would have been of benefit to Holloman during the trial. There was no question during the trial but that the victim had been attacked. Absent suggestion by Holloman as to how it would have made a difference in cross-examining the victim, we are totally at a loss to understand how an examination of the victim's home would have been of any benefit to Holloman in his defense.

Likewise with regard to the claim that counsel should have personally inspected Holloman's apartment so that he could have cross-examined the officers concerning the location of the sweater and the shoes, we are at a loss to understand the argument.

The arresting officer testified at a suppression hearing that after he had identified himself and advised Holloman that he was a suspect in an alleged rape, Holloman consented to the officers' entry into the apartment while Holloman dressed. The testimony then proceeds as follows:

"Q As Mr. Holloman was dressing, was he in your view at all times?

"A Yes, he was.

"Q You had no problems with him?

"A No problems, no.

"Q What happened then?

"A Well, while he was dressing, I noticed a couple pairs of shoes lying on the floor, right where he was sitting down putting his clothes on.

"Q And what did you do then, if anything?

"A I picked up these shoes and observed the heels on them.

"Q What did you observe about the heels?

"A On a pair of dress shoes I observed the heel had an impression similar to that which I had seen in the back yard of the residence of the victim, which was right next door.

"Q What did you do then?

"A I took these shoes as evidence.

"Q All right, were those in the same room as Mr. Holloman was then dressing in?

"A Yes, right next to him.

"Q Do you recall what kind of shoes those were?

"A Florsheim, I believe, they were.

"Q Now, what happened then?

"A Well, he continued to dress, and Officer Keavy pointed out a sweater, which was laying on the chair right next to the bed where he was sitting at.

"Q All right, what kind of sweater was it?

"A It was a light blue long-sleeved sweater, which was mentioned in the original report that the suspect was possibly wearing at the time of the assault.

"Q Was that in the same room in which Mr. Holloman

was dressing?

"A Yes.

"Q What did you do then?

"A I took the sweater as evidence."

The evidence with regard to the shoes and sweater is clear and straightforward. The officer testified that they were near or next to Holloman while he was dressing and that both Holloman and the clothes were in the officer's plain view at all times. Holloman now contends that had his counsel personally viewed his apartment, he might have been able to cross-examine the officer as to the location of the sweater and shoes. Yet he does not in any way advise us how the statements made by the officer were not true or how an investigation would have produced helpful evidence. We are totally at a loss to know how counsel's examination of Holloman's premises a month after his arrest could have possibly produced any evidence which would have discredited the officer's testimony to the effect that the shoes and sweater were in plain view. And Holloman does not advise us how such an investigation would have produced any evidence. He merely argues that if counsel had examined the premises of either the victim or Holloman, he might have in some manner conceived some ingenious argument which would have been of benefit to Holloman. Such a claim is not sufficient to entitle Holloman to post conviction relief. "[W]here one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced one." *State v. Colgrove*, 207 Neb. 496, 500, 299 N.W.2d 753, 756 (1980). See, also, *State v. Harlan*, 205 Neb. 676, 289 N.W.2d 531 (1980). Likewise, we have frequently held in post conviction relief cases that the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. See *State v. Kelly*, 190 Neb. 41, 205 N.W.2d 646 (1973). In a post conviction proceeding the burden of proof is on the movant to establish a basis for

relief, and where such burden is not met a denial of that requested relief is required. See, *State v. Pankey*, 208 Neb. 377, 303 N.W.2d 305 (1981); *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978). The record in this case simply fails to disclose how counsel's failure to examine the various premises in any way prejudiced Holloman. The trial court was correct in denying post conviction relief on that basis.

We now turn to the remaining ground raised by Holloman in his claim for post conviction relief. Holloman now maintains that his trial counsel inadequately represented him in that he did not interview a known alibi witness and call her to testify at trial. At best, the evidence in this case is in conflict as to whether the alibi witness in fact existed at the time of the original trial. At the post conviction hearing both Holloman and the alibi witness, a Brenda Mitchell, testified that they were with each other in bed at Holloman's apartment when the alleged attack was to have occurred and that, therefore, Holloman could not have been the attacker. Holloman's trial counsel denies that he was ever told about Brenda Mitchell being with Holloman at the time that the attack was alleged to have occurred. The evidence in the case would tend to support the statement of trial counsel.

At the initial trial, where Holloman did not testify, two witnesses were called by Holloman. They consisted of a Charles Bush and a Janice Mitchell, Brenda Mitchell's older sister. Both of them testified that Holloman had been with them at a party and was taken home around 6:30 a.m. No mention was made by either of the witnesses as to the presence of Brenda Mitchell. Brenda now maintains that the reason neither mentioned her name at trial was because she asked them not to. She said her reason for not wanting her presence to be disclosed was due to the fact that she was only 14 years of age and her parents had forbidden her to have any relations with Holloman. Neither Bush

nor Janice Mitchell testified at the post conviction trial in support of Brenda Mitchell's claim.

Furthermore, a Mr. Pitmon Foxall, an investigator for the public defender's office, from where Holloman's counsel was appointed, did in fact interview Brenda Mitchell before trial. During that interview she never mentioned being with Holloman, and in fact her statement was to the contrary. The report indicates that she told Foxall "she did not believe Holliman [sic] would do a thing like that, cause all he would have to do was come over and see her." The clear implication from the statements given by Brenda Mitchell to investigator Foxall was that she was not with Holloman at the time the alleged attack occurred.

There are further inconsistencies in her testimony. Brenda Mitchell testified at the post conviction hearing that she left Holloman's apartment when the police first attempted to talk to Holloman at approximately 7:30 a.m. She said she went next door to her own home where her sister, Janice, let her in. However, the investigative report prepared by Foxall, dated October 7, 1975, indicates that Janice advised Foxall that she was not, on the day of the attack, living at home, but, rather, was living with her cousin, Karen Mitchell. Court-appointed counsel further testified that during one of the initial interviews with Holloman, the matter of an alibi defense was discussed. At that time Holloman advised counsel that at the time of the alleged crime he was in bed and had no alibi. There was obviously a conflict in the evidence at the post conviction hearing which the trial court was required to resolve. It resolved that conflict in favor of the State and against Holloman. We cannot say that the trial court's determination in that regard was in error. "[I]t is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine plausibility of explanations, or weigh evidence. Such matters are for the trier of fact, and the verdict must be sustained

if, taking the view most favorable to the State, there is sufficient evidence to support it." *State v. Fowler*, 201 Neb. 647, 658, 271 N.W.2d 341, 348 (1978). See, also, *State v. Tiff*, 199 Neb. 519, 260 N.W.2d 296 (1977). It is apparent to us, as it was obviously apparent to the trial court, that trial counsel did not call Brenda Mitchell to testify as an alibi witness because Brenda Mitchell did not exist as an alibi witness at the time of the trial. In fact, had she been called to testify then, as she now claims she would have testified, her testimony would have been in direct conflict with the testimony of two other witnesses already called without objection by Holloman. The trial court obviously concluded that the claim of Holloman to the effect that his trial counsel was inadequate was totally unsupported by any evidence and wholly without merit. We agree with that conclusion. The judgment of the trial court in denying post conviction relief is affirmed.

AFFIRMED.

LASHONDA WATSON, BY HER FATHER AND NEXT FRIEND, GEORGE W. WATSON, AND GEORGE W. WATSON, INDIVIDUALLY, APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

312 N.W.2d 256

Filed November 6, 1981. No. 43488.

1. **Tort Claims Act: Appeal and Error.** Findings of fact made by the District Court in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977), will not be disturbed on appeal unless clearly wrong.
2. **Recreation Liability Act: Words and Phrases.** The term "owner," as used in the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1978), includes a political subdivision as well as a private person.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and dismissed.

Herbert M. Fitle, Omaha City Attorney, and James E. Fellows for appellant.

John H. Bernstein of Higgins & Okun for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

On Friday, June 30, 1978, LaShonda Watson, age 2½ years, fell from a slippery slide located in Lake James Park and suffered a fractured leg. This action was brought by her father and next friend under the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977), to recover damages from the defendant, City of Omaha, which owned and operated the public park. The District Court entered judgment in favor of the plaintiff in the total amount of $6,086.85. Although the City of Omaha assigns several errors in this appeal, including the sufficiency of the evidence to support the judgment, contributory negligence of the plaintiff and her parents, and the absence of negligence on the part of the defendant, the principal issue, and the one upon which a decision in this case turns, is the applicability of the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1978), to a municipality. We reverse and dismiss the action.

Sometime during the afternoon of the date of the accident, the plaintiff, together with her 10-year-old brother Kevin, two cousins, a sister, and a friend of Kevin's, all being 12 years of age or younger, went to the park to play. The children were playing on the slide in spite of the fact that they had noticed that the greater portion of the left handrail had been cut off and was missing. Both Kevin and LaShonda were on the second step from the platform when one of the cousins started doing a flip at the top of the slide. As a result of this activity, Kevin told LaShonda to get out of the way so that she would not get kicked. LaShonda started down,

holding on to the upper part of the left handrail that was still in place, but when she got to the point where the rail was missing she fell to the ground, fracturing her leg.

Witnesses provided conflicting accounts as to how long the handrail had been missing. Plaintiffs' witnesses stated the rail had been missing for approximately 2 weeks prior to the accident, while the maintenance people of the City of Omaha testified that it was in place as late as the morning of the accident. There was also evidence that the rail had been cut with a pipe cutter and that the ends of the rail where cut were not rusty. The City of Omaha was notified of the accident late that same afternoon by LaShonda's father. Mr. Watson testified further to observing that repairs had been made to the slide by the following Monday.

The Recreation Liability Act, particularly at §§ 37-1001, 37-1002, and 37-1005, provides in part that the purpose of the act is to "encourage owners of land to make available to the public land . . . for recreational purposes by limiting their liability . . ." and, consequently, "an owner of land owes no duty of care to keep the premises safe for . . . use by others for recreational purposes, or to give any warning of a dangerous condition . . ." except that liability is not limited "for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity . . . ." The Political Subdivisions Tort Claims Act provides generally at §§ 23-2402(4) and 23-2407 that a political subdivision shall be liable for the negligent acts or omissions of its employees "in the same manner, and to the same extent as a private individual under like circumstances . . . ."

At the conclusion of all the evidence the district judge found that the damages to the plaintiff, as previously related, were a proximate result of the negligence of the City of Omaha without any contributory negligence on the part of the plaintiff or her parents, that the negligence of the City did not rise to the level of a willful or

malicious failure to guard or warn against a dangerous condition, but that the Recreation Liability Act, §§ 37-1001 et seq., did not apply to the defendant.

All the findings of fact made by the District Court are amply supported by the record, and therefore we cannot say that they are clearly wrong. Accordingly, they will not be disturbed on appeal. *Miles v. School Dist. No. 138*, 204 Neb. 105, 281 N.W.2d 396 (1979). Therefore, if the legal conclusion of the trial court that the Recreation Liability Act does not apply to the City of Omaha is proper, the judgment should be affirmed. Otherwise, it must be reversed and the case dismissed.

In support of the ruling of the District Court, the plaintiffs insist that it is necessary to turn to the legislative history of the Recreation Liability Act in order to determine the intent of the Legislature. In support of this position, plaintiffs cite the case of *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 227, 281 N.W.2d 762, 767 (1979), where we said: "Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes." However, plaintiffs overlook the admonition contained in *State ex rel. Halloran v. Hawes*, 203 Neb. 405, 279 N.W.2d 96 (1979), that a statute is open to construction only where the language used requires interpretation or may reasonably be considered to be ambiguous. Equally applicable is the following language from *Ragland v. Norris P. P. Dist.*, 208 Neb. 492, 497, 304 N.W.2d 55, 58 (1981): "'"A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute."'"

The conclusion reached by the District Court is not

without authority. In *Goodson v. Racine*, 61 Wis. 2d 554, 213 N.W.2d 16 (1973), that court, in construing a statute similar to ours, concluded: "Thus, the legislative intent of the statute is obvious and we hold that sec. 29.68, Stats., is not applicable to a municipality so as to limit its liability for persons injured while present on its property. The statute must be strictly construed so as to limit its effect to private landowners." *Id.* at 559, 213 N.W.2d at 19. In support of its position, the Wisconsin court quoted from the legislative act establishing this particular statute: "'An Act to create 29.68 of the statutes, relating to the limitations on liability of landowners who open *private* lands for recreational purposes.' (Emphasis supplied.)" No such statutory purpose appears in 1965 Neb. Laws, Ch. 193, p. 589, which created §§ 37-1001 et seq. See, also, *Loney v. McPhillips*, 268 Or. 378, 521 P.2d 340 (1974), wherein, by dicta, the Oregon Supreme Court suggested that the legislative purpose in enacting a similar act was to "encourage private owners to make their land available to the public for recreational purposes," and *Metropolitan Dade County v. Yelvington*, 392 So. 2d 911 (Fla. App. 1980), in which the court, without discussion or explanation, simply stated that its recreation liability act did not apply to a county.

However, to the contrary, and applying such acts to government ownership, are *Magro v. City of Vineland*, 148 N.J. Super. 34, 371 A.2d 815 (1977); *Stone Mountain Mem. Assn. v. Herrington*, 225 Ga. 746, 171 S.E.2d 521 (1969); *Rushing v. State, Through La. Health, Etc.*, 381 So. 2d 1250 (La. App. 1980); *Smith v. United States*, 383 F. Supp. 1076 (D. Wyo. 1974); *McClain v. United States*, 445 F. Supp. 770 (D. Or. 1978); *Gard v. United States*, 594 F.2d 1230 (9th Cir. 1979), construing Nevada's "sightseer statute"; *Hahn v. United States*, 493 F. Supp. 57 (M.D. Pa. 1980); and *Moore v. City of Torrance*, 101 Cal. App. 3d 66, 166 Cal. Rptr. 192 (1979). It should be noted that *Nelsen v. City of Gridley*, 113 Cal. App. 3d 87, 169 Cal. Rptr. 757 (1980), from the Court of Appeals of a dif-

ferent district, contains language critical of *Moore* and suggests that the application of the recreation liability act was limited to private owners. However, the statutes in California relating to governmental tort immunity vary in degree and complexity from our Political Subdivisions Tort Claims Act so that no clear-cut analogy can be made.

We may concede for the sake of argument that the original purpose of the "recreational liability acts" was to encourage private landowners to offer their lands for use by the public. See *Suggested State Legislation*, Vol. XXIV, Council of State Governments (1965), wherein it is stated at 150: "The suggested act which follows is designed to encourage availability of private lands by limiting the liability of owners to situations in which they are compensated for the use of their property and to those in which injury results from malicious or willful acts of the owner." We are also mindful of the reasoning of the Court of Common Pleas of Centre County, Pennsylvania, in an unreported opinion referred to in *Hahn v. United States*, *supra*. In that opinion, the state court found that at the time of passage of the Recreation Use of Land and Water Act, the Commonwealth already enjoyed sovereign immunity from tort actions and therefore it was not the intent of the Legislature to grant such "redundant immunity" by including the Commonwealth within the definition of "owner" as contained in the act.

However, we must consider the language of the Political Subdivisions Tort Claims Act, previously cited, which subjects a political subdivision to liability for the negligent acts or omissions of its employees "in the same manner, and to the same extent as a private individual under like circumstances." We did say in *Koepf v. County of York*, 198 Neb. 67, 71, 251 N.W.2d 866, 869 (1977), that "[t]he liability of a political subdivision under the Political Subdivisions Tort Claims Act is not an absolute liability, but consists of such liability as would exist in a private person or cor-

poration without that immunity." As stated in *Primo v. Bridgeton*, 162 N.J. Super 394, 400, 392 A.2d 1252, 1256 (1978): "Therefore the public entity is entitled to assert the defenses that a private property owner has in like circumstances."

Whatever the Legislature's intent was at the time of the enactment of the Recreation Liability Act, we believe that the definition of owner—"the term owner includes tenant, lessee, occupant, or person in control of the premises"—is sufficiently broad to cover a public entity. In *Stone Mountain Mem. Assn. v. Herrington*, *supra*, the Georgia court stated at 748-49, 171 S.E.2d at 523: "Defendants . . . contend that the 1965 Act was intended to apply merely to privately owned land . . . . Nothing on the face of this Act indicates in any way an intention on the part of the legislature to so limit its effect."

The Legislature, in enacting the Political Subdivisions Tort Claims Act and thereby declaring a political subdivision responsible for its torts in the same manner as a private individual, is presumed to have knowledge of previous legislation, including the Recreation Liability Act. *Wahlers v. Frye*, 205 Neb. 399, 288 N.W.2d 29 (1980). Having placed no limitation upon this declaration or upon the definition of "owner" in the Recreation Liability Act, we believe that the intent of the Legislature, as reflected by the clear language of both statutes, was to grant the same rights and privileges to governmental and private landowners alike.

Slippery slide activities are not specifically included within the definition of recreational purposes contained in the Recreation Liability Act. "[T]he term recreational purposes shall include, *but not be limited to*, any one or any combination of the following: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, *or*

otherwise using land for purposes of the user." (Emphasis supplied.) § 37-1008(3). However, we believe that definition to be broad enough to include the normal activities afforded by public parks.

We therefore conclude that the term "owner of land," as used in the Recreation Liability Act, includes a political subdivision. This was the principal issue upon which the parties tried this action, and which we now determine was incorrectly decided by the trial court. However, under the record made in this case we are obligated to follow the findings of fact made by the District Court that there was no "willful or malicious failure to guard or warn" on the part of the defendant, and consequently we must conclude that no liability attached to the City of Omaha. The judgment of the District Court is reversed and plaintiffs' action is ordered dismissed.

REVERSED AND DISMISSED.

WHITE, J., dissenting.

I would agree with the cases cited in the majority opinion holding that absent anything on the face of the act indicating an intent to apply the Recreation Liability Act to municipalities, the act clearly does not apply.

The Recreation Liability Act was passed in 1965, at which time political subdivisions were immune from liability. It is clear from the legislative history that the act was passed to encourage private landowners to make their land and water areas available for recreational purposes such as fishing and hunting. There was no need to pass such an act to limit the liability of political subdivisions since they were already immune.

In 1969 the Political Subdivisions Tort Claims Act was adopted. In the absence of any legislative history, the majority presents that the Legislature played a great game of "now you have it, now you don't." Under the majority interpretation of the Political Subdivisions Tort Claims Act, the Legislature in reality retained

most of the immunity the act purported to surrender. We have today gutted the act.

Under the majority opinion, the Recreation Liability Act would not apply to activities such as swimming pools, picnic shelters, organized softball leagues, zoos, stadiums, and auditoriums, although it would presumably apply outside the boundaries where those activities take place. If an identical condition is present inside the boundaries of a swimming pool area, and outside, the person inside injured thereby might recover while the nonpaying person outside could not, under the identical circumstances. I find it difficult to believe the Legislature intended such a result.

I agree with the conclusions of the trial court that allowing the dangerous condition to exist for 2 weeks on an implement used principally by children of tender years was negligence. The legislative history makes it clear that the Legislature, in passing the Recreation Liability Act, intended only to limit the liability of owners of private lands. I would affirm.

McCOWN, J., joins in this dissent.

ROBERT W. CAMERLINCK, A MINOR, BY AND THROUGH HIS PARENT AND NEXT FRIEND, ROBERT CAMERLINCK, APPELLANT, V. ANN J. THOMAS, GUARDIAN AD LITEM OF BYRON J. THOMAS (FORMERLY KNOWN AS JAMES E. CLAYTON III), A MINOR, APPELLEE.

312 N.W.2d 260

Filed November 6, 1981. No. 43506.

1. **Directed Verdict.** A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Minors: Negligence.** If the actor is a child, the standard of care to which

he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under the circumstances.

3. **Trial: Minors: Negligence.** Where reasonable minds might draw different conclusions from the evidence, the question as to a child's negligence or contributory negligence under the circumstances is a matter for determination by the jury.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded for a new trial.

Thomas J. Culhane of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for appellant.

Joseph K. Meusey of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

The issue in this case is whether a child 6 years of age is chargeable with negligence as a matter of law. In this case, Robert Camerlinck, father and next friend of the plaintiff, Robert W. Camerlinck (Bobby), brought an action against Ann J. Thomas, mother of Byron J. Thomas (Jay), to recover damages for an injury sustained when Bobby was struck in his left eye with a stick by Jay Thomas while Jay was sliding down a playground slide. As Jay neared the bottom of the slide, he called out, "Hey, Bobby"; Bobby, who was standing near the bottom of the slide, turned around in response to the call and was struck in the left eye with a stick held by Jay. The blow pierced Bobby's eyeball and caused a laceration of the cornea and a prolapsed iris, necessitating surgical procedures and resulting in a permanent loss of vision to Bobby. Bobby was 4½ years of age at the time of the occurrence, and the defendant's son, Jay, was 6 years and 1 month old. At the close of the plaintiff's evidence, defendant moved for a directed verdict and dismissal of the petition because, as a matter of law, the defendant's son was a

child of tender years and not capable of actionable negligence. The trial court sustained defendant's motion and dismissed plaintiff's petition.

In his brief on appeal, plaintiff assigns as error the action of the trial court in ruling that Jay was incapable of negligence as a matter of law solely because of his age, and also in sustaining defendant's motion to dismiss, contending that the trial court should have submitted to the jury the question of whether Jay was negligent under the circumstances present in the case.

Since the trial court in this case directed a verdict and dismissed plaintiff's petition, we note that the standard of review applicable to this case has been stated as follows: "A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." *Bear v. Auguy*, 164 Neb. 756, 760, 83 N.W.2d 559, 563 (1957). See, also, *Armer v. Omaha & Council Bluffs St. Ry. Co.*, 151 Neb. 431, 37 N.W.2d 607 (1949); *Syas v. Nebraska Methodist Hospital Foundation*, *ante* p. 201, 307 N.W.2d 112 (1981).

At this point, a review of the Nebraska case law dealing with the negligence of children is necessary. One of the earliest cases to discuss the question is *Huff v. Ames*, 16 Neb. 139, 19 N.W. 623 (1884). That case involved an action by a boy 11 years of age who was injured when his hand was caught between the rollers in a mill, resulting in the amputation of two of his fingers. The defendant claimed the injury resulted from the contributory negligence of the infant plaintiff. This court held that it was proper for the trial court to instruct the jury that in determining whether or not the plaintiff was guilty of negligence

it should take into consideration his age and discretion in determining that fact and that the same degree of caution and care should not be required of him as in the case of an adult under similar circumstances. In *Huff* the court pointed out: "'Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child three years of age, less caution would be required than of seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case.'" *Id.* at 142, 19 N.W. at 624.

In 1914 we decided the case of *Dore v. Omaha & C.B. Street R. Co.*, 97 Neb. 250, 149 N.W. 792 (1914), in which we held that it cannot be said to be negligence as a matter of law for a child of the age of 7 years, after giving of signal for a streetcar to stop at the next street crossing, to leave his seat as the car approaches the desired crossing and stand in the doorway preparatory to leaving the car, when the car should stop at the indicated point for stopping. In that case we stated: "The strict rules of contributory negligence cannot be applied to a child of the age of plaintiff at that time. The facts necessarily found by the jury fail to show any negligence on his part, even could his age not excuse or exempt him from that charge." *Id.* at 255, 149 N.W. at 794.

In 1915 the issue was again presented to this court in *Sacca v. Omaha & C. B. Street R. Co.*, 98 Neb. 73, 152 N.W. 315 (1915). In *Sacca* this court stated: "It is urged that the court erred in taking away from the jury the question of contributory negligence on the part of the child. Without attempting to fix the exact age at which a child may be said to be responsible for his acts, and capable of being guilty of negligence, we believe that this child, who was under six years of age, cannot, under all of the circumstances of the case, be charged with negligence, and that the action of the

court in withdrawing this question from the jury was not prejudicial. The child was of such tender years that it cannot be deemed in law possessed of sufficient discretion to make it guilty of negligence for its failure to exercise due care for its safety." *Id.* at 76, 152 N.W. at 316.

In 1917 we held in *Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N.W. 883 (1917), that, as a general rule, whether a child 11 years of age is of sufficient knowledge, discretion, and appreciation of danger that it may be held guilty of contributory negligence is a question for the jury to determine. Quoting from the opinion in that case: "It is also argued that a party cannot complain of the negligence of another where his own negligence concurs in producing the injury, and that a child 11 years of age living in the city and of ordinary intelligence may be guilty of contributory negligence as a matter of law. Of the soundness of these propositions we have little doubt. The general rule is that whether contributory negligence may be attributed to a child of such tender years is a matter for the jury under all the circumstances of each case. *Breedlove v. Gates*, 91 Neb. 765. It is only in an extreme case where the facts show plainly knowledge and appreciation of the danger to be incurred if a certain act is performed, such as in the case of *Johnston v. New Omaha T.H.E.L. Co.*, 78 Neb. 27, that a court will declare as a matter of law that a child of that age may be guilty of contributory negligence. The writer has always been of the view that the *Johnston* case is an exception to the general rule, and its doctrine should not be further extended. Even if it were established that the plaintiff was of full age and discretion and 'cut the corner' in violation of the ordinance, yet this would not necessarily establish contributory negligence as a matter of law. *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848, 859; *Missouri P. R. Co. v. Geist*, 49 Neb. 489, 496." *Id.* at 7-8, 165 N.W. at 884.

De Griselles v. Gans, 116 Neb. 835, 219 N.W. 235

(1928), involved an accident between a truck and an 8-year-old boy who ran out of an open yard behind a brick building. The court held as a matter of law that the act of the child was the proximate cause of the collision; but in the opinion, Redick, District Judge, stated: "The plaintiff's decedent, on account of his tender age, is not chargeable with contributory negligence, but in determining the existence of negligence upon the part of the defendant, having no notice of the presence of children, the same rules apply in both cases; and while the boy is not chargeable with negligence, if his act, whether negligent or not, was the proximate cause of his death, there can be no recovery." *Id.* at 843, 219 N.W. at 238.

The statements contained in the *Sacca* and *De Griselles* cases, *supra*, were repeated and affirmed in the subsequent case of *McKinney v. Wintersteen*, 122 Neb. 679, 241 N.W. 112 (1932), in which case this court held that a child 6 years of age is not possessed of sufficient discretion to make her guilty of negligence, or contributory negligence, for her failure to exercise due care for her safety.

That same year this court decided the case of *Siedlik v. Schneider*, 122 Neb. 763, 241 N.W. 535 (1932), which involved the alleged contributory negligence of a boy 7 years of age. In that case this court held that a child of tender years is not chargeable with contributory negligence, and that an instruction submitting that question to the jury was error. In *Siedlik* the court, citing as authority the *Sacca* and *De Griselles* cases, stated: "A child of tender years—and it must be conceded that the plaintiff was a child of tender years—is not chargeable with negligence or with contributory negligence." *Id.* at 765, 241 N.W. at 536.

Siedlik was followed in 1947 by the case of *Tews v. Bamrick and Carroll*, 148 Neb. 59, 26 N.W.2d 499 (1947), which case involved a minor 5 years of age who ran into the side of a truck tractor and was

injured. In the opinion in that case, this court, citing as authority the *McKinney*, *Siedlik*, and *De Griselles* cases, stated: "It can be here said that the conduct of the boy was undoubtedly negligent, but we have often said a child of tender years is not chargeable with contributory negligence." *Id.* at 66, 26 N.W. 2d at 504.

The issue before us was discussed in more detail in the case of *Armer v. Omaha & Council Bluffs St. Ry. Co.*, 151 Neb. 431, 37 N.W.2d 607 (1949), which case involved the capacity for negligence of an 11-year-old girl. In that case the court held that the age when an infant during his minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and generally is a question of fact for the jury, and that whether or not an infant between 11 and 12 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. Because of its excellent discussion, we quote rather extensively from the opinion of the court at 437-38, 37 N.W.2d at 610-11: "The appellant was about three months past 11 years of age, and cannot be charged with the degree of caution required of an adult in guarding against possible accidents while traveling upon and crossing a street in a city. There is no arbitrary rule fixing the time at which a child during its minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such an activity. It is generally considered that such a question is one of fact to be decided by a jury. Whether or not negligence may be attributed to a child of such tender years is usually a matter for a jury under the circumstances of each case. It is only in an extreme situation where the facts show plainly knowledge and appreciation of the danger to be incurred, if certain action is had, that a court may decide as a matter of law that a child of such an age

was guilty of negligence, or that his act or omission was the proximate cause of the happening in question. It was a question for the jury whether or not the appellant, a child slightly more than 11 years of age, was or could be negligent, and whether or not any act or omission on her part was the proximate cause of the collision. Tews v. Bamrick, 148 Neb. 59, 26 N.W.2d 499; Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N.W. 883; Chicago, B. & Q. R.R. Co. v. Russell, 72 Neb. 114, 100 N.W. 156; Kauffman v. Fundaburg, 123 Neb. 340, 242 N.W. 658; McKinney v. Wintersteen, 122 Neb. 679, 241 N.W. 112; Siedlik v. Schneider, 122 Neb. 763, 241 N.W. 535.

"The conduct of appellant as shown by this record should not, her age considered, conclusively bar her right of recovery, conceding that she was a bright, intelligent girl; had lived in Omaha and had on occasions ridden bicycles on the streets for two years; and was as familiar with the operations of vehicles and bicycles on the street as any girl of her age and discretion would usually be. She doubtless knew that there was danger of injury in traveling in the street and in turning to the left to cross the street. Nearly any child of her age would answer, if asked, that it knew if it fell in the river it might be drowned; if it fell in the fire it would be burned; or if it got in the way of a streetcar or a motor vehicle it would be injured and possibly killed; but mere childish knowledge of everyday things does not necessarily establish that they appreciate or understand the necessity for keeping away from, or not doing these things. They act on impulse, and often the greater the danger, the greater the challenge. They do dangerous things without thought of the consequences that may follow what they do, and to conclude as a matter of law that a child of such an age as the appellant should be held to the high standards demanded of adults in looking after their own and the safety of others is opposed to good judgment and sound law. The infant is favored by

the law not so much on his lack of knowledge as because of indiscretion, imprudence, lack of judgment, and impulsiveness.

"What is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation. Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P. 2d 785, 100 A.L.R. 440; Sadlowski v. Meeron, 240 Mich. 306, 215 N.W. 422; Hackert v. Prescott, 165 Minn. 134, 205 N.W. 893; Annotation, 107 A.L.R. 4; Annotation, 174 A.L.R. 1174; Collins v. Weise, 110 Neb. 552, 194 N.W. 450; 45 C.J., Negligence, § 552, p. 998."

Armer was followed by the case of *Adams v. Welliver*, 155 Neb. 331, 51 N.W.2d 739 (1952), which involved a minor 9 years of age. In that case the court ruled that the age when an infant during its minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury. The court also ruled that whether or not an infant between 9 and 10 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. The court also held that what is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation. In its opinion in *Adams* the court quoted at length from *Armer* and *De Griselles*, and concluded by stating at 341, 51 N.W.2d at 745: "The cases determined by this court which hold that an infant of tender years is not chargeable with contributory negligence appear to be cases where the infant is shown to be 7 years old or less, and where the evidence discloses the infant did not possess sufficient knowledge, discretion, and appreciation of the danger that he might be subject to the defense of

contributory negligence."

The case of *Bear v. Auguy*, 164 Neb. 756, 83 N.W.2d 559 (1957), held that whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. The court also reiterated the rule previously stated that the degree of care required of a minor is that which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. In its opinion in *Bear* the court stated at 767-69, 83 N.W.2d at 567: "The standard of care required of a minor such as the plaintiff at the time of the accident is set forth in Armer v. Omaha & C.B. St. Ry. Co., 151 Neb. 431, 37 N.W.2d 607. The plaintiff was 14 years and nearly 8 months of age at the time of the accident, and cannot be charged with the same degree of caution required of an adult in guarding against possible accidents while traveling upon and crossing a street in a city. There is no arbitrary rule fixing the time at which a child during his minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such an activity. Whether or not negligence may be attributed to a minor of the age of the plaintiff is usually a matter for a jury under the circumstances of each case. It is only in an extreme situation where the facts show plainly knowledge and appreciation of the danger that may be incurred, if certain action is had, that a court may decide as a matter of law that a minor of such an age was guilty of negligence, or that his act or omission was the proximate cause of the happening in question. See, Tews v. Bamrick, 148 Neb. 59, 26 N.W.2d 499; Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N.W. 883; Chicago, B. & Q. R.R. Co. v. Russell, 72 Neb. 114, 100 N.W. 156; Kauffman v. Fundaburg, 123 Neb. 340, 242 N.W. 658; McKinney v. Wintersteen, 122 Neb. 679, 241

N.W. 112; Siedlik v. Schneider, 122 Neb. 763, 241 N.W. 535.

"The conduct of the plaintiff as shown by this record should not, his age considered, conclusively bar his right of recovery, conceding that he was a bright and intelligent boy, had lived in Omaha, was acquainted with the use of bicycles as most boys of his age are, and was familiar with the operation of motor bicycles having ridden thereon with other boys although this was the first occasion upon which he had operated one.

"What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P.2d 785, 100 A.L.R. 440; Sadlowski v. Meeron, 240 Mich. 306, 215 N.W. 422; Hackert v. Prescott, 165 Minn. 134, 205 N.W. 893; Annotation, 107 A.L.R. 4; Annotation, 174 A.L.R. 1174; Collins v. Weise, 110 Neb. 552, 194 N.W. 450; 65 C.J.S., Negligence, § 146, p. 789; Locklin v. Fisher, 264 App. Div. 452, 36 N.Y.S.2d 162." In *Bear* the court held that the evidence was such that reasonable minds might draw different conclusions therefrom, and stated at 771, 83 N.W.2d at 569: "This being true, *the questions of negligence and contributory negligence are for the jury.*" (Emphasis supplied.)

Shortly after releasing our opinion in *Bear* this court decided the case of *Connors v. Pantano*, 165 Neb. 515, 86 N.W.2d 367 (1957), which case involved a slightly different question, that is, whether a child of the tender age of 4 years and 7 months was legally incapable of committing a willful and intentional act of destroying property within the purview of Neb. Rev. Stat. § 43-801 (Reissue 1952). The court held that a child of that age was incapable of so doing because he had not at that age sufficiently attained the use of those qualities of attention, intelligence, judgment, and reason that would be necessary for him to be capable of doing such act

willfully and intentionally. However, in the opinion in that case this court stated at 518-19, 86 N.W.2d at 369: "A comparable line of cases of this and other courts are those dealing with contributory negligence. Although an infant is liable for his torts (Churchill v. White, *supra*), we have often held a child of tender years cannot be charged with contributory negligence even though the latter does not require intent. See, Siedlik v. Schneider, 122 Neb. 763, 241 N.W. 535; Tews v. Bamrick, 148 Neb. 59, 26 N.W.2d 499. And this same holding has been applied to primary negligence. See Shaske v. Hron, 266 Wis. 384, 63 N.W.2d 706. As stated in Shaske v. Hron, *supra*: 'There is an age of a child at which general experience declares him to be non sui juris, and it has been generally considered that a child under five and one-half years of age is incapable of either contributory or primary negligence.' In the same opinion the court quotes from Restatement, Torts, § 283(e), p. 743, as follows: 'If he is "so young as to be manifestly incapable of exercising any of those qualities of attention, intelligence, and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character," he is generally held incapable of negligence.'"

In *Eden v. Klaas*, 166 Neb. 354, 89 N.W.2d 74 (1958), this court ruled that a child 5 years of age may not properly be charged with contributory negligence.

This case was followed by *Vacanti v. Montes*, 180 Neb. 232, 142 N.W.2d 318 (1966), in which we held that what is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger will use in the same situation; and that the age that an infant during its minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury. However, in that case the infant involved

was between 9 and 10 years of age, and the court instructed the jury that whether or not negligence may be attributed to a minor of the age of the plaintiff is a matter for the jury to determine under all the circumstances of the case. This court stated that the instruction quite fully and correctly set forth the standard of duty and care required of the plaintiff as a minor and the law concerning contributory negligence as applied to her as stated in *Adams v. Welliver*, 155 Neb. 331, 51 N.W.2d 739 (1952).

Nine years later, this court decided *Gadeken v. Langhorst*, 193 Neb. 299, 226 N.W.2d 632 (1975), which involved the question of whether a minor 11 years of age could be guilty of negligence. The court, citing as authority *Bear v. Auguy*, 164 Neb. 756, 83 N.W.2d 559 (1957), and *Sacca v. Marshall*, 180 Neb. 855, 146 N.W.2d 375 (1966), held that a minor 11 years of age is required to exercise that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation; and, also, that whether negligence may be attributed to a minor 11 years of age is usually a question of fact for the jury. In *Korbelik v. Johnson*, 193 Neb. 356, 361, 227 N.W.2d 21, 24 (1975), we stated: "Even if a child is not capable of contributory negligence, if such child's conduct can be considered the sole proximate cause of his injury there can be no recovery," citing as authority *De Griselles v. Gans*, 116 Neb. 835, 219 N.W. 235 (1928).

The most recent expression by this court on the question before us appears to be that contained in the case of *Caradori v. Fitch*, 200 Neb. 186, 263 N.W.2d 649 (1978), which involved an 11-year-old girl who was struck and killed by a vehicle while she was riding a bicycle. In that case the court restated the rule that a minor is held to the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use. In the opinion the court stated: "The defendant first objects

to the instruction which detailed to the jury the standard of care of a child. The instruction recited that a minor is held to the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use. The instruction was consistent with Nebraska law. See, Bear v. Auguy, 164 Neb. 756, 83 N.W.2d 559; Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N.W.2d 607." *Id.* at 188-89, 263 N.W.2d at 652.

It is obvious from a review of the foregoing authorities that the law of Nebraska as to whether a child of tender years, particularly a child of the age of Jay in this case, may be chargeable with negligence is, to say the least, not definitely settled, and our court has on various occasions pronounced totally different rules of law with reference to the question presented. It must be conceded, as a review of the foregoing authorities reveals, that this court has on occasions held that a child of tender years is not chargeable with contributory negligence as a matter of law, and the cases enunciating this rule have involved children ranging in age from 5 years of age to 11 years of age. In addition, we have also held that an ordinary, bright and intelligent boy of 12 who, having knowledge of the danger arising from electric light and power wires but not of its extent, purposely takes hold of such a wire in order to obtain a shock is guilty of contributory negligence. *Johnston v. New Omaha Thomson-Houston Electric Light Co., on rehearing*, 78 Neb. 27, 113 N.W. 526 (1907).

The more recent cases, however, appear to uphold the rule that there is no arbitrary rule fixing the time at which a child during his minority may be wholly capable or incapable of understanding and avoiding dangers to be encountered, and that whether or not negligence may be attributed to a minor is usually a matter for the jury. It should also be noted that although the cases in some jurisdictions distinguish between negligence and contributory negligence of

minors, Nebraska has been consistent in its holding that the same standards should apply in either situation. See, *Bear v. Auguy, supra; Connors v. Pantano*, 165 Neb. 515, 86 N.W.2d 367 (1957). Other jurisdictions have ruled to the same effect. See, *Goss v. Allen*, 70 N.J. 442, 360 A.2d 388 (1976); *DeLuca v. Bowden*, 42 Ohio St. 2d 392, 329 N.E.2d 109 (1975); *Zuckerbrod v. Burch*, 88 N.J. Super. 1, 210 A.2d 425 (1965); *Dunn v. Teti*, __ Pa. Super. Ct. __, 421 A.2d 782 (1980).

It appears that the rule advocated by the defendant in this case, which attempts to fix a minimum age below which a child is held to be incapable of negligence, is not the majority rule in this country, but, in fact, is a minority rule. Professor William L. Prosser discusses the matter in his treatise, "The Law of Torts," and reaches that conclusion, stating: "Some courts have attempted to fix a minimum age, below which the child is held to be incapable of all negligence. Although other limits have been set, those most commonly accepted are taken over from the arbitrary rules of the criminal law, as to the age at which children are capable of crime. Below the age of seven, the child is arbitrarily held to be incapable of any negligence; between seven and fourteen he is presumed to be incapable, but may be shown to be capable; from fourteen to twenty-one he is presumed to be capable, but the contrary may be shown. These multiples of seven are derived originally from the Bible, which is poor reason for such arbitrary limits; and the analogy of the criminal law is certainly of dubious value where neither crime nor intent is in question. The great majority of the courts have rejected any such fixed and arbitrary rules of delimitation, and have held that children well under the age of seven can be capable of some negligent conduct. Undoubtedly there is an irreducible minimum, probably somewhere in the neighborhood of four years of age, but it ought not to be fixed by rules

laid down in advance without regard to the particular case. As the age decreases, there are simply fewer possibilities of negligence, until finally, at some indeterminate point, there are none at all." W. Prosser, Law of Torts, *Negligence: Standard of Conduct* § 32 at 155-56 (4th ed. 1971). See, also, F. Harper & F. James, Law of Torts, *The Nature of Negligence* § 16.8 (1956).

We believe that the best statement of the rule with reference to the negligence of children is stated in Restatement (Second) of Torts § 283 A (1965), and the Comment to that section. The rule itself is cited in that work as follows at 14: "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances." The Restatement states that the rule contained in that section is commonly applied to children of tender years. In Comment b of that section the Restatement discusses the *"Special standard for children,"* and we quote from that Comment at 15-16:

"The special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them.

"A child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult. His conduct is to be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience. A child may be so young as to be manifestly and utterly incapable of exercising any of those qualities of attention, perception, knowledge, experience, intelligence, and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character. On the other hand, it is obvious that a minor who has not yet attained his majority may be quite as capable as an adult of exercising such qualities. Some courts have

endeavored to lay down fixed rules as to a minimum age below which the child is incapable of being negligent, and a maximum age above which he is to be treated like an adult. Usually these rules have been derived from the old rules of the criminal law, by which a child under the age of seven was considered incapable of crime, and one over fourteen was considered to be as capable as an adult. The prevailing view is that in tort cases no such arbitrary limits can be fixed. Undoubtedly there is a minimum age, probably somewhere in the vicinity of four years, below which negligence can never be found; but with the great variation in the capacities of children and the situations which may arise, it cannot be fixed definitely for all cases.

"Between the two extremes there are children whose capacities are infinitely various. The standard of conduct required of the child is that which it is reasonable to expect of children of like age, intelligence, and experience. 'Intelligence' includes other mental capacities, but does not include judgment, which is an exercise of capacity rather than the capacity itself. The fact that the child is mentally retarded, or that he is unusually bright for his years, is to be taken into account; but once such account is taken, the child is still required to exercise the judgment of a reasonable person of that intelligence. Likewise to be taken into account are the circumstances under which the child has lived, and his experience in encountering particular hazards, or the education he has received concerning them. If the child is of sufficient age, intelligence, and experience to understand the risks of a given situation, he is required to exercise such prudence in protecting himself, and such caution for the safety of others, as is common to children similarly qualified.

"It is impossible to lay down definite rules as to whether any child, or any class of children, should be able to appreciate and cope with the dangers of

many situations. A child of ten may in one situation have sufficient capacity to appreciate the risk involved in his conduct, and to realize its unreasonable character, but in another situation he may lack the necessary mental capacity or experience to do so; and in the case of another child of ten of different mental capacity or experience a different conclusion may be reached in the same situation."

Our review of the case law and discussion by commentators convinces us that the rule embodied in the Restatement, *supra*, should be followed in this jurisdiction; and we hereby apply it to the facts of this case and adopt it for future application.

In the instant case it would appear that at least a fact question with reference to Jay's capacity to realize that his actions presented a risk of harm to the plaintiff was present and should have been submitted to the jury. It appears from the record that Jay had attended 1 year of school and that his performance as a student had been at least average. The school he attended was located 4 or 5 blocks from his grandmother's home and he was permitted by his mother to return to his grandmother's home from school each day by himself. His mother testified that she permitted this because she felt he was experienced and mature enough to take care of himself. The park in which the plaintiff was injured was located near the home of Jay's grandmother, and Jay was frequently permitted to play in the park, unsupervised and unattended. Defendant testified that she had no doubt about his ability to take care of himself while alone in the park, and that she frequently talked with him about what he should and should not do when playing with other children, and had cautioned him against throwing things in the direction of other children's faces. Defendant testified that Jay seemed to understand her directions and warnings. This set of circumstances, we believe, presented a jury question on the issue of Jay's capacity for negligence, and also

whether or not his conduct was negligent.

We conclude that the trial court erred in directing a verdict in favor of the defendant and in dismissing plaintiff's petition. We therefore reverse the judgment and remand the case for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., dissents.

RICHARD E. FOWLER, APPELLANT, V. NATIONAL BANK OF COMMERCE TRUST AND SAVINGS ASSOCIATION, APPELLEE.

312 N.W.2d 269

Filed November 6, 1981. No. 43549.

1. **Pleadings: Judicial Notice.** While a court will not ordinarily take judicial notice of its records in another case, it is proper in considering a demurrer to take judicial notice of the records in another case which is so closely interwoven as to be interdependent.
2. **Pleadings: Demurrer.** Leave to amend a petition should ordinarily be granted after a demurrer is sustained. However, when it is clear that no reasonable possibility exists that plaintiff will, by amendment, be able to state a cause of action, leave to amend may be denied.
3. **Criminal Law: Collateral Estoppel.** A prior criminal proceeding can work a collateral estoppel in a subsequent civil proceeding, if the question involved is distinctly put in issue and directly determined in the criminal action.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Richard E. Fowler, pro se.

Knudsen, Berkheimer, Beam, Richardson & Endacott for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and STANLEY, District Judge.

CLINTON, J.

The plaintiff, Richard E. Fowler (Fowler), brought this action in the District Court for Lancaster County

against the National Bank of Commerce Trust and Savings Association (NBC) for its alleged negligence in maintaining the ledgers of the deposit account of Steak-O-Rama, the former employer of Fowler. In the petition it is claimed the alleged negligence caused Fowler to be convicted of the crime of embezzlement and to be sentenced to a term in the penitentiary. NBC filed a demurrer to Fowler's third amended petition on the ground the petition did not state a cause of action and also joined therewith a motion to dismiss the petition on the ground of collateral estoppel. The trial court sustained the demurrer, took judicial notice of prior proceedings pertaining to Fowler's conviction of embezzlement, and dismissed the petition. Fowler has appealed to this court. He makes several assignments of error which, in substance, allege that the court erred in sustaining the demurrer and dismissing the petition.

Fowler's third amended petition or complaint alleged he was convicted in the District Court for Lancaster County of the crime of embezzling the sum of $433.37 from Steak-O-Rama, his employer. The above amount constituted the receipts of the restaurant for the day of January 25, 1974. The petition alleged that the records of the bank were not introduced in evidence at his trial. Fowler further alleges in the petition that NBC negligently maintained Steak-O-Rama's deposit records on the specific dates of January 21, 1974, and February 4, 1974. He does not allege he deposited the receipts of January 25, 1974, in the bank, nor does he allege any error in the bank records with respect to the receipts of which he was accused of embezzling.

At the hearing on the demurrer and the motion to dismiss, the ledgers for the month of January 1974 were received in evidence, as was Fowler's testimony from the preliminary hearing and portions of the bill of exceptions from the criminal trial. The court, upon request, took judicial notice of the records of the criminal prosecution and the later post conviction proceeding.

The conviction and the denial of post conviction relief were appealed to this court and affirmed. *State v.*

Fowler, 193 Neb. 420, 227 N.W.2d 589 (1975); *State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978).

Even if we assume NBC owes a duty to Fowler in relation to keeping the records of his employer (a question we need not decide), it is clear the petition does not state a cause of action as it does not allege any fact or facts which tend to show a causal connection between the bank's alleged negligence and Fowler's conviction.

We now quote and adopt the following portions of the trial court's memorandum opinion: "Defendant also moves the Court to dismiss the plaintiff's action with prejudice. Leave to amend should ordinarily be granted after a demurrer is sustained, especially in respect to an original complaint, if there is a reasonable possibility that a cause of action can be stated. *Cagle, Inc. v. Sammons*, 198 Neb. 595, 604, 254 N.W.2d 398, 404 (1977). This is, however, the third time a demurrer has been sustained to Mr. Fowler's attempts to state a cause of action against the National Bank of Commerce. Furthermore, the defendant contends that there is no reasonable possibility that plaintiff can state a cause of action against it.

"The defendant relies on the records of this Court in the prior criminal proceeding against Mr. Fowler to support its assertion that no cause of action can be stated. National Bank of Commerce has asked this Court to take judicial notice of its records in those proceedings and has introduced into evidence certain portions of the testimony therein in support of its motion.

"While a court will not ordinarily take judicial notice of its records in another case, it is proper in considering a demurrer to take judicial notice of the records in another case which is so closely interwoven as to be interdependent. *Knapp v. City of Omaha*, 175 Neb. 576, 122 N.W.2d 513 (1963) [other citations omitted]. In the case at bar, in which plaintiff alleges his criminal conviction is the result of the defendant's negligence, it is clearly proper for this Court to take judicial notice of the records in Mr. Fowler's criminal case, *State v.*

Fowler, Docket 39, Page 119, District Court of Lancaster County, Nebraska.

"A review of the record of Mr. Fowler's trial, motion for new trial and postconviction relief proceeding establishes that the plaintiff has never contended that he made a deposit of the missing January 25, 1974 cash receipts of Steak-O-Rama. Instead, he has stated and testified under oath that he placed the money in a deposit bag and put it in a cabinet in the Steak-O-Rama store rather than depositing it, and that was the last he ever saw of it.

"Since the deposit was never made, any error in the deposit records of the defendant could not have resulted in Mr. Fowler's wrongful conviction. Therefore, there is no possibility that Mr. Fowler will be able to state a cause of action against the defendant. Accordingly, the plaintiff will not be given leave to amend his complaint. *Evans v. Metropolitan Utilities District*, 184 Neb. 172, 166 N.W.2d 411 (1969)."

The records in the post conviction proceeding, of which this court may take judicial notice, show the issue pertaining to the bank's records was litigated in that action. In the post conviction action, Fowler alleged and testified that his counsel should have introduced the bank records. His counsel testified he had examined the records. He decided not to introduce them because the records, tending only to confirm Fowler's position at trial that he never made the deposit, would not have been helpful to Fowler's case.

Prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was "distinctly put in issue and directly determined" in the criminal action. *McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 76 (8th Cir. 1976), citing *Emich Motors v. General Motors*, 340 U.S. 558, 71 S. Ct. 408, 95 L. Ed. 534 (1951). See, also, *Cardillo v. Zyla*, 486 F.2d 473 (1st Cir. 1973); *Rosenberg v. Martin*, 478 F.2d 520 (2d Cir. 1973).

AFFIRMED.

OPAL J. STURM AND MERLE STURM, HER HUSBAND; BLANCHE GLADYS JENNINGS AND IVAN JENNINGS, HER HUSBAND; AND BETHEL L. ZIETTLOW, APPELLANTS, V. RAYMOND W. MAU AND BEULAH L. MAU, HUSBAND AND WIFE, APPELLEES.

312 N.W.2d 272

Filed November 6, 1981. No. 43588.

1. **Equity: Appeal and Error.** In an equity action it is the duty of the Supreme Court to try the issues de novo upon the record and reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case.
2. **Prescriptive Easements: Adverse Possession: Proof.** A prescriptive right is not looked upon with favor, and generally must be proved by clear, convincing, and satisfactory evidence.
3. **Highways: Adverse Possession: Prescriptive Easements.** To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land.
4. **Prescriptive Easements: Adverse Possession: Proof.** Ordinarily, where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. Under such circumstances, the owner of the servient estate, in order to avoid acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive.
5. **Prescriptive Easements: Adverse Possession.** The presumption of adverse use does not arise when a prescriptive easement is claimed over land which is unenclosed and which has no defined pathway across it.
6. **Appeal and Error.** Error may not be predicated upon a ruling which excludes evidence, unless a substantial right of the party is affected.
7. **Adverse Possession.** If the initial entry is adverse, an actual claim of ownership is not necessary to establish a claim of right.
8. ____. If adverse possession continues for the required 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances affirmatively showing the contrary, such as occupancy under a lease, an easement, or a permissive use; the title of the true owner is lost by his inaction.

9. **Highways: Adverse Possession: Prescriptive Easements.** It is not indispensable to the establishment of a highway by prescription that there be no deviation in the line of travel; if the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like, there have been slight changes in the line of travel.
10. ____: ____: ____. A diminution in the number of users does not constitute an abandonment of a road acquired by prescription.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Baldwin & McKernan for appellants.

Marti, Dalton, Bruckner, O'Gara & Keating, P.C., and Ronald R. Brackle for appellees.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and RIST and CAPORALE, District Judges.

CAPORALE, District Judge.

Plaintiffs-appellants seek to establish, by prescriptive easement, a road in favor of the public across land owned by the defendants-appellees.

The trial court denied plaintiffs any relief and dismissed their petition. For the reasons set forth hereinafter, we reverse the judgment of the trial court.

In this equity action it is our duty to try the issues de novo upon the record and reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *O'Neill Production Credit Assn. v. Mitchell*, *ante* p. 206, 307 N.W.2d 115 (1981); *Schmidt v. Chimney Rock Irrigation Dist.*, *ante* p. 1, 305 N.W.2d 888 (1981); *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980).

A prescriptive right is not looked upon with favor, and generally must be proved by clear, convincing, and satisfactory evidence. *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979); *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977); *Mehling v. Deines*, 191 Neb. 287, 214 N.W.2d 627 (1974).

To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land. Neb. Rev. Stat. § 25-202 (Reissue 1979); *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976); *State v. Kilberg*, 192 Neb. 661, 223 N.W.2d 665 (1974); *Dunnick v. Stockgrowers Bank of Marmouth*, 191 Neb. 370, 215 N.W.2d 93 (1974).

Ordinarily, where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. Under such circumstances, the owner of the servient estate, in order to avoid acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive. *Svoboda v. Johnson, supra; Fischer v. Grinsbergs, supra; Smith v. Bixby, supra; Dunnick v. Stockgrowers Bank of Marmouth, supra.* The above-stated general rule is subject to an exception. The presumption of adverse use does not arise when a prescriptive easement is claimed over land which is unenclosed and which has no defined pathway across it. *Svoboda v. Johnson, supra; Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948). See, also, 4 H. Tiffany, Law of Real Property § 1196.1 (3d ed. 1975).

It is with the foregoing standard of review and principles of law in mind that we review the evidence to determine whether, as claimed by plaintiffs, the trial court erred in finding that the public's use of the

pathway was neither adverse nor under a claim of right.

Until the early 1950s, north-south Highway 53 lacked a bridge across the Little Blue River in the area of the juncture of Sections 23, 24, 25, and 26, Township 3 North, Range 1 West of the 6th P. M., Thayer County, Nebraska. From 1934, at the latest, to 1950, at the earliest, the general public, without permission from or interference by anyone, used an east-west pathway, 20 feet wide, across land owned by the defendants and their predecessors in title. The route began at a point adjoining plaintiffs' land, thence eastward along the north boundary line of the northeast quarter of said Section 26 and south boundary line of the southeast quarter of said Section 23, to a point joining Highway 53. There have been minor variations in the course of the way over the years due to the inherent nature of the area traversed, and due to rains, floods, and natural causes and conditions. The origin, terminus, course, location, and use of the route remained substantially unchanged.

Since the Highway 53 bridge was built, travel over the route has diminished. The pathway has been used mostly for farming operations, and by hunters and fishermen. Since about 1967 some travelers have asked permission to use the road and some have paid consideration to defendants for its use; others have done neither. In about 1977 defendants padlocked a gate which existed at the east end of the pathway when they purchased the land in 1959.

The record is silent as to whether defendants' predecessors in title gave permission for travelers to cross their land by the route in question. However, the evidence clearly, convincingly, and satisfactorily establishes that the user was open, notorious, visible, continuous, and unmolested from at least 1934 to 1950, a period in excess of 10 years. Therefore, the crucial question becomes whether the presumption of adverse use arises. We find it does.

Since at least 1912 this court has held to the view that

open, continuous, and unmolested use of a roadway across the premises of another for a period fo 10 years gives rise to a presumption that the user was under a claim of right, and that where one seeks to close a way over his land which has been enjoyed by his neighbor for such a period, he has the burden of showing that the use was permissive. *Majerus v. Barton*, 92 Neb. 685, 139 N.W. 208 (1912). The most recent application of that rule is found in *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979), which granted private easements, but denied a public one. Defendants, on the other hand, rely on three cases in which an exception to the general rule was applied. Defendants argue that those three cases hold that the presumption does not apply when dealing with unenclosed land and that those cases control the disposition of this case. They do not control. In the first case relied on by defendants, *Connot v. Bowden*, 189 Neb. 97, 200 N.W.2d 126 (1972), the court ruled that the evidence failed to establish a roadway easement across adjoining land, not because the presumption did not apply but because the use was not shown to be continuous and uninterrupted for the required period of time. Another case relied upon by defendants, *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948), involved unplatted islands used for hunting purposes. In denying claimant an easement, the court ruled the evidence established the original entry and use was permissive. It is true that in the third case, *Scoville v. Fisher*, 181 Neb. 496, 149 N.W.2d 339 (1967), we denied a prescriptive easement over an unenclosed and open town lot, stating that evidence land is unenclosed is sufficient to rebut the presumption of adverse use. However, as observed in *Scoville*, the general rule must be interpreted in light of the facts of each case. In *Stubblefield*, there was no defined pathway across the unenclosed land; in the case at bar there is such a defined pathway. The result in this case is ordained by *Svoboda v. Johnson, supra*, which stated the applicable rule to be that "even though land may be unenclosed,

where there is a well-defined path or roadway thereon, the rule as to a presumption of adverse use applies, and places the burden on the landowner to establish that the use by the claimant of the prescriptive right was permissive." *Id.* at 67-68, 281 N.W.2d at 900.

In this connection, defendants argue that the trial court erred in refusing to receive in evidence certain exhibits which they claim would have constituted conclusive evidence that the user was permissive. The exhibits to which they refer tend to show that in 1945, 1950, and 1951, Thayer County paid to one of defendants' predecessors in title $20 on each of three occasions and $25 on one occasion either as rent for a "roadway" or for "right-of-way." On April 1, 1952, Thayer County paid the same predecessor in title $50 for "Release of Agreement." Even if it were to be assumed that the payments were for permission to use the pathway, receipt of the exhibits into evidence would not have changed the resolution of the permissive use issue. The payments were not made until after the full 10-year prescriptive period. Thus, if it were error to have sustained the objections to receipt of the exhibits, it was harmless error. Error may not be predicated upon a ruling which excludes evidence, unless a substantial right of the party is affected. Neb. Rev. Stat. §§ 25-853 and 27-103 (Reissue 1979); *Harrigfeld v. Nebraska Liquor Control Commission*, 203 Neb. 741, 280 N.W.2d 61 (1979).

The evidence fails to rebut the presumption of adverse use; we therefore hold that the trial court erred in finding that the public's use of the pathway in question was not adverse.

We must now consider whether the evidence establishes that the user was under a claim of right. We hold that it does. If the initial entry is adverse, an actual claim of ownership is not necessary to establish a claim of right. If adverse possession continues for the required 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances

affirmatively showing the contrary, such as occupancy under a lease, an easement, or a permissive use; the title of the true owner is lost by his inaction. *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979); *Barnes v. Milligan*, 196 Neb. 50, 241 N.W.2d 508 (1976); *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957).

It is not indispensable to the establishment of a highway by prescription that there be no deviation in the line of travel; if the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like, there have been slight changes in the line of travel. *Satterfield v. Dunne*, 180 Neb. 274, 142 N.W.2d 345 (1966); *Pierce v. Rabe*, 177 Neb. 745, 131 N.W.2d 183 (1964).

The evidence establishes that the course of travel across defendants' land has remained substantially unchanged for the full period from 1934 to 1950, more than the 10 years required to establish adverse possession, and, indeed, to the present. That remaining element has therefore been proved.

The fact that there has been a diminution in the number of travelers on the road since the bridge was built in 1950 over the Little Blue River at Highway 53 does not constitute an abandonment of the road. *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976).

The evidence thus compels a finding that the plaintiffs have established a roadway in favor of the public across defendants' land, 20 feet wide, located as stated earlier in this opinion.

The findings and judgment of the trial court are reversed, and the cause is remanded for the entry of a judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RALPH SULLIVAN, APPELLANT, V. GENERAL UNITED LIFE INSURANCE COMPANY, APPELLEE, SAPP BROS. LEASING, INC., INSURANCE DIVISION, NOW KNOWN AS LEE SAPP INSURANCE, INC., INTERVENOR-APPELLEE.

312 N.W.2d 277

Filed November 6, 1981. No. 43636.

Equity: Pleadings. The prayer of a pleading tenders no issue, and neither adds to nor takes from the evidence required of either party. The prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Michael W. Heavey of Dwyer, O'Leary & Martin, P.C., for appellant.

Jim L. Kuhn of Liakos & Kuhn for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and GITNICK, District Judge, and COLWELL, Retired District Judge.

COLWELL, Retired District Judge.

This is an equity suit on an oral contract assigning insurance commissions. Plaintiff, Ralph Sullivan, sues defendant, General United Life Insurance Company, for a declaratory judgment and judgment for commissions. General answers and pays commissions into court. Intervenor, Sapp Bros. Leasing Inc., Insurance Division, now known as Lee Sapp Insurance, Inc., alleges an oral contract and written assignment of commissions between it and plaintiff for all commissions earned from General, and prays to determine valid assignment or in the alternative for judgment for commissions, for declaratory judgment, and for equitable relief.

Plaintiff and intervenor each filed motions for summary judgment. Upon hearing, a partial summary

judgment was granted that plaintiff's written assignment of commissions was void and contrary to Neb. Rev. Stat. § 36-213 (Reissue 1978), and that plaintiff did revoke his written assignment on November 17, 1978. The court ordered the cause to proceed to trial on the remaining issues, including the terms of the oral contract and the rights of the parties therein. Upon trial, judgment was entered in favor of intervenor that it was entitled to all renewal and new commissions earned by plaintiff from General on policies written prior to December 7, 1978. Plaintiff appeals, assigning as error (1) the award of renewal commissions on policies written prior to August 1, 1977, and (2) exclusion of relevant evidence. This de novo review follows.

Briefly, the facts are that on August 1, 1977, plaintiff and Lee H. Sapp concluded negotiations and orally agreed to start a new insurance sales agency. Plaintiff was experienced in insurance sales and management, and he possessed several agency sales contracts, including one with General. Sapp was to provide the financing. A corporation would be formed; ownership would be 50-50; plaintiff would handle all sales and management; plaintiff's compensation would be $1,500 a month, business expenses, and use of a car; and plaintiff agreed to assign to the corporation all commissions thereafter due to him on policies sold by him as agent for General, whether new or renewals.

Sapp arranged for plaintiff to borrow funds to buy stock in the corporation and the stock was held by the lender as collateral. Plaintiff ultimately paid for and received stock representing a 40 percent interest in the corporation. Plaintiff received and was paid the agreed compensation. For the first few months, plaintiff's commissions from General were paid by check to him, and he endorsed them to intervenor. Later, plaintiff executed and filed with General a written assignment of commissions, and thereafter all General commissions, new and renewals, were paid by check to intervenor until this controversy arose and the plaintiff filed a re-

vocation of assignment with General.

The terms of the oral agreement and of the written assignment were generally performed by plaintiff and intervenor. Personal conflict developed between plaintiff and Sapp concerning plaintiff diverting to himself some General commissions, plaintiff's claim that Sapp was attempting to force him out of the business, and the payment and delivery of plaintiff's stock certificates. On December 7, 1978, plaintiff severed his working relationship with intervenor.

Plaintiff's main argument is that the judgment awarding to intervenor the renewal commissions on policies written prior to August 1, 1977, exceeded its prayer for relief, particularly referring to that part which states: "[T]hat the Assignment of Commissions dated August 1, 1977, be declared to be valid and in full force and effect, or in the alternative that the Court determine that the Intervenor is entitled to all commissions earned from the policies of insurance sold and issued through the efforts of the Intervenor or its employees, including Ralph Sullivan, from and after August 1, 1977 . . . ."Plaintiff cites as authority *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974), which was a law action and a jury verdict.

The prayer of a pleading tenders no issue, and neither adds to nor takes from the evidence required of either party. The prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence. *Standard Reliance Ins. Co. v. Schoenthal*, 171 Neb. 490, 106 N.W.2d 704 (1960); *Sechovec v. Harms*, 187 Neb. 70, 187 N.W.2d 296 (1971).

Intervenor having prayed for equitable relief, there is no merit to plaintiff's argument. Further, the evidence conclusively supports intervenor's pleadings and the judgment in its favor.

Plaintiff claims error that the court rejected certain evidence to show that intervenor breached the oral con-

tract, including evidence of a controversy between plaintiff and Sapp for the payment and delivery of corporate stock to plaintiff. The court did receive plaintiff's evidence in this area until the record revealed that the stock had been delivered to plaintiff, at which time a ruling was made that such evidence was not relevant. Under the pleadings and the court order defining the trial issues, such evidence was not relevant and no substantial right of the plaintiff was affected. See Neb. Rev. Stat. §§ 27-106 and 27-403 (Reissue 1979).

AFFIRMED.

DIANE K. HARB, APPELLANT, V. HERBERT H. HARB, APPELLEE.

312 N.W.2d 279

Filed November 6, 1981. No. 43641.

Child Support. Where the custodial parent has removed the minor children from the jurisdiction of the trial court, the costs of exercising reasonable visitation by a noncustodial parent is a factor which may be considered along with all other attendant circumstances in determination of a modification of an existing award for child support.

Appeal from the District Court for Lancaster County; DALE E. FAHRNBRUCH, Judge. Affirmed.

John S. Mingus of Mingus & Mingus for appellant.

Herbert H. Harb, pro se.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and KORTUM and GRANT, District Judges.

KORTUM, District Judge.

This is an appeal from an order modifying and increasing the amount of child support payments in a divorce decree.

The original divorce decree entered on July 15, 1970, granted custody of the twin daughters of the parties to the appellant herein, granted the appellee herein rights

of reasonable visitation, and provided for child support in the sum of $40 per month for each child, a total of $80 per month.

At the time of the original divorce decree the appellant was a student at the University of Nebraska and the appellee a student at Bryan Memorial Hospital. The appellant was not employed at the time of the original decree. The earnings of the appellee at that time were a gross amount of $2,269 and net earnings of $1,815.87.

At the time of the modification hearing the appellant was a self-employed insurance agent with gross earnings of $13,944.37 and a net income of $7,103.14. The appellee at that time had gross earnings of $26,967.14 and a net income of $17,658.03 from his employment as a registered nurse.

In 1971, after the original divorce, the appellant moved to Alaska where she and the children lived until 1975. She then moved to the state of Washington where she now resides.

The appellee lived in Nebraska for some time after the original decree and now lives in Michigan.

The trial court took extensive evidence relating to the present needs of the minor children and to the need for increased support. In its order of modification the trial court noted that it was taking into consideration the fact that the appellant had removed the children from the state of Nebraska and the result would be a greater expense to the appellee of exercising his visitation rights.

The court modified the child support upward to provide for support of $100 per month per child. The appellant brings this appeal, alleging that the increase was insufficient and that the trial court erred in taking into consideration the possible increased expenses of the appellee in exercising his visitation rights.

The proceedings in a divorce case with reference to an adjudication of child support is a continuation of the divorce suit and one of its incidents. *Johnson v. Johnson*, 177 Neb. 445, 129 N.W.2d 262 (1964).

The factors to be considered by the trial court in its determination of a child support award are clearly set forth in the cases. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account. *Brus v. Brus*, 203 Neb. 161, 277 N.W.2d 683 (1979).

There is no mathematical formula for computing child support awards and each case must stand on its own facts. A resort to other cases, although similar factually, cannot be determinative of the child support issue, since each case requires subjective reasoning and analysis based on the evidence and the witnesses before the court. *Boroff v. Boroff*, 204 Neb. 217, 281 N.W.2d 760 (1979).

Neb. Rev. Stat. § 42-364 (Reissue 1978) provides for the revision or modification of child support orders. Where there has been a change in circumstances the same rules apply as in the original divorce in determining whether child support payments should be increased or reduced. The added expense of exercising visitation is only one factor to be considered along with others in setting or modifying child support allowances.

Where the custodial parent has removed the minor children from the jurisdiction of the trial court, the costs of exercising reasonable visitation by a noncustodial parent is a factor which may be considered along with all other attendant circumstances in determination of a modification of an existing award for child support.

The decision of the trial court is correct and the judgment is affirmed.

AFFIRMED.

LESLIE ENGEL, APPELLEE, V. NEBRASKA METHODIST HOSPITAL, APPELLANT.

312 N.W.2d 281

Filed November 6, 1981. No. 43926.

1. **Workmen's Compensation: Appeal and Error.** The scope of review in the Nebraska Supreme Court for findings of fact made by the three-judge panel of the Nebraska Workmen's Compensation Court after rehearing is that those findings of fact shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workmen's Compensation: Words and Phrases.** The causation test of exertion "greater than nonemployment life" is applied by this court only in cases of heart attacks alleged to have been caused by the employment and not to other types of injury.
3. **Workmen's Compensation: Proof.** When a workmen's compensation claimant is alleged to have suffered a disability rising out of and in the course of his employment which consists of the aggravation of a preexisting condition, the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Kirk S. Belcha and Richard E. Putnam of Baird, Holm, McEachen, Pedersen & Hamann for appellant.

James R. Welsh and Robert V. Roach of Welsh, Sibbernsen & Bowen for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an appeal from an award made to the plaintiff Engel by a three-judge panel of the Nebraska Workmen's Compensation Court on rehearing. The award was $168.10 per week so long as the defendant remained permanently disabled. The employer, Nebraska Methodist Hospital, appeals to this court. We affirm.

There is no dispute as to the evidence. Engel was employed by the hospital as a maintenance supervisor. At the time of the alleged injury on December 31, 1979, he

and two other employees, in the course of the employment, lifted a carpet weighing about 100 pounds. Plaintiff testified that at the time a severe pain shot into his lower back and down his legs. The plaintiff's condition worsened after the incident and had not improved at the time of trial. Since the incident he has been unable to engage in any kind of physical activity, including activities he engaged in prior to the accident such as lawnmowing, snow removal, changing tires, and the work required in his hospital employment. He had not been able to return to work at the time of trial.

In 1967, while serving in the Army in Vietnam, he was wounded in the back and other parts of the body by an exploding mortar shell. As a consequence, he draws a veteran's disability pension. The evidence further shows that he has a spondylolysis, a congenital defect in the bony connection between vertebrae. Such a condition is usually painless until affected by physical trauma. Before he was wounded, the spondylolysis was asymptomatic. After his war injuries he had some pain in his back, but returned to active duty as an instructor in the use of the .50-caliber machine gun. He was honorably discharged in 1969. After his discharge he worked on an assembly line in a lawnmower factory for a period of time. He also studied heating and air-conditioning at a trade school and received a degree in that field. When unable to find employment in that trade, he accepted a position as a hospital custodian at the Veterans Administration Hospital. He also worked for the Quaker Oats Company as a manual laborer, which required lifting and stooping. In May of 1973 he began his employment as a maintenance supervisor with the defendant, Nebraska Methodist Hospital, and worked there until the occurrence of the lifting incident out of which this workmen's compensation claim arises. In his hospital employment he washed walls and windows, shampooed carpets, carried buckets of water, and performed required duties. Prior to the incident of December 31, 1979, he had physical "complications"

arising from his Vietnam wounds, including back pain, and he was examined periodically by doctors of the Veterans Administration to determine his continuing eligibility for disability payments.

The pertinent and only medical testimony in this case, as shown on the direct and cross-examination of the attending physician, is as follows:

"Q Doctor, based upon your experience as a medical physician and based upon your examination of Mr. Leslie Engel, do you have an opinion you can state with reasonable medical certainty as to the cause of Leslie Engel's injuries that you found as a result of your examination?

"A It's my opinion, after examining him, that there were two episodes in his life that caused him to have a painful spondylolysis. The first was the Vietnam injury which then gave him a certain level of back pain that I would describe as minimal to moderate. The injury of December of '79 made the spondylolysis become even more painful, a level that I would describe as moderate to severe.

"Q This is the injury he received on December 31, 1979, while lifting the carpeting, as described to you?

"A That's correct.

"Q Doctor, again based upon your medical expertise and your examination of Leslie Engel, do you have an opinion that you can state with reasonable medical certainty as to the period of time that Mr. Leslie Engel has been totally disabled as a result of the injuries he suffered on December 31, 1979?

"A From December 31, 1979, through the present.

"Q Do you have an opinion you can state with reasonable medical certainty as to whether or not he will require treatment in the future, as a result of the injuries he suffered on December 31, 1979?

"A Yes.

I feel very strongly that he should have a spinal fusion.

"Q What would be, in your opinion, the approximate

cost of this spinal fusion, taking into account the hospitalization, and surgery fees, and so forth? Just a rough estimate.

"A About $10,000.

. . . .

"Q I think when we were visiting last night, you told me that there was nothing peculiar about the work place that caused the experience of more pain December 31, 1979, and that other types of strenuous activity — I think were your words — away from the work place could have also caused this condition. Is that a fair assessment?

"A Yeah.

I think that any strenuous activity could cause a person with spondylolysis to become more symptomatic.

"Q I think the example that I used last night was, for instance, the strenuous activity involved in changing a tire.

"A Yes.

"Q Would you agree with me that that would be the type of thing in everyday life that could set this spondylolysis off?

"A Yes."

The hospital assigns errors in its brief which raise the following propositions: (1) Where the employee aggravates a preexisting disease or condition, the test of legal causation requires the plaintiff to show the exertion at the work place was greater than the usual level of exertion present in the normal nonemployment life of the workman or any other person; and (2) The employee must prove the injury was not the result of the normal progression of his preexisting condition which would have been sustained even in the absence of the accident.

The following principles govern our review in this case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud,

(3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact do not support the order or award. *Chrisman v. Greyhound Bus Lines, Inc.*, 208 Neb. 6, 301 N.W.2d 595 (1981). When determining whether the evidence is sufficient to sustain an award of the three-judge panel of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered in the light most favorable to the successful party. The successful party must receive the benefit of every reasonably deducible inference, and every controverted fact must be resolved in his favor. *Chrisman v. Greyhound Bus Lines, Inc., supra.* The findings of fact made by the three-judge panel of the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect in this court as a jury verdict in a civil case and will not be set aside unless clearly wrong. *White v. Father Flanagan's Boys' Home*, 207 Neb. 528, 300 N.W.2d 15 (1980).

To support its first claim, the hospital relies upon the following cases: *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980), and *Chrisman v. Greyhound Bus Lines, Inc., supra.*

The hospital argues that in the case of an aggravation of a preexisting condition, liability should not be imposed when the exertion causing the injury is no greater than that occurring in nonemployment activity. The defendant reasons that nonemployment activity could have triggered the disability at any time. As such, it is alleged, the back injury occurring during employment is merely coincidental, and the employer should not be held liable under the circumstances.

The exertion "greater than nonemployment life" test has been applied by this court only in cases involving heart attacks allegedly caused by the activities or stress of employment. *Chrisman v. Greyhound Bus Lines, Inc., supra; Sellens v. Allen Products Co., Inc., supra; Hyatt v. Kay Windsor, Inc.*, 198 Neb. 580, 254 N.W.2d 92

(1977); *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978); *Beck v. State*, 184 Neb. 477, 168 N.W.2d 532 (1969); *Brokaw v. Robinson*, 183 Neb. 760, 164 N.W.2d 461 (1969).

The rationale for the rule is discussed at some length in *Sellens, supra* at 509-11. Where a person suffers from a preexisting condition which he claims is aggravated by his employment, he has an increased burden of proving causation. The exertion "greater than nonemployment life" test is simply an application of the increased burden of proof required in preexisting condition cases to the unique problems of proving causation of a myocardial infarction. We find no reason to extend the rule to other cases where the proof of causation is not usually as complex.

In the second proposition, to wit, the employee must prove the injury was not the result of the normal progression of his preexisting condition which would have been sustained even in the absence of the accident, the hospital proposes a rather subtle interpretation of the governing legal principle which distorts the underlying reason for the rule. The employer emphasizes the language "would have been sustained even in the absence of the accident," and argues that a normal progression of the disease would most probably have, at some time, resulted in the disability for which compensation is sought. The language this court has sometimes used in stating the principle, when read in the abstract, might lead one to that conclusion, but it is plain that is not its meaning when we consider the facts of individual cases. The question simply is whether the plaintiff suffered an injury arising out of and in the course of his employment which aggravated the preexisting condition and resulted in the disability. The principle does not require the claimant to prove that the disease or condition will not sometime *in the future* through natural progression result in disability.

The most accurate statement of the principle is found in *Aguallo v. Western Potato, Inc.*, 208 Neb. 66, 302

N.W.2d 41 (1981). "The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition." (Syllabus of the court.) The phrase "even in the absence of the accident," which we find in some cases, for example, *Taylor v. Benton*, 205 Neb. 203, 209, 286 N.W.2d 755, 758 (1980), is not to be taken to refer to possible future progression. It is enough that the accident aggravated, accelerated, or inflamed the preexisting condition.

AFFIRMED.

KRIVOSHA, C.J., and BRODKEY, J., concur in result.

LAURELL E. SCHUERMAN, APPELLANT, V.
ARLIN G. SCHUERMAN, APPELLEE.

312 N.W.2d 286

Filed November 6, 1981. No. 43985.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

H. Jeanne Thorough of Kelley & Thorough for appellant.

A. James McArthur for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and RIST and CAPORALE, District Judges.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEARY DANDRIDGE, APPELLANT.

312 N.W.2d 286

Filed November 6, 1981. No. 44022.

1. **Criminal Law: Evidence.** Generally, it is within the discretion of the trial court whether evidence of other crimes is admissible.
2. ____: ____. It is also within the discretion of the trial court whether other offenses are sufficiently similar to the one charged so that evidence of the other offenses has probative value.
3. ____: ____. In determining whether evidence of other crimes is admissible, important considerations are remoteness in point of time and unique, almost "signature-like" similarity between the charged crime and the other crimes.
4. ____: ____. In determining whether the suppression of evidence was prejudicial to an accused, it must be evaluated in the context of the entire record.
5. **Motions for New Trial: Evidence.** If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.
6. **Prosecuting Attorneys.** There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work.
7. ____. Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct.
8. **Witnesses: Jury Instructions.** The fact that an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction.
9. **Prosecutorial Misconduct.** An argument by a prosecuting attorney which is based on the evidence and inferences drawn therefrom does not ordinarily constitute misconduct.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Gerald L. Soucie for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

After trial to a jury the defendant was convicted of robbery, use of a firearm in the commission of a felony, and being an habitual criminal. He was sentenced to consecutive terms of imprisonment for 10 years on each count.

The defendant has appealed and has assigned as error (1) failure to admit evidence of other similar crimes committed while the defendant was incarcerated as proof that defendant was not guilty of the robbery charged, (2) failure to declare a mistrial when the State violated a pretrial order, (3) misconduct of the county attorney in failing to disclose statements made by the defendant's accomplice, (4) prosecutorial misconduct in failing to disclose the true nature of the plea bargain with a prosecuting witness who was granted immunity, (5) prosecutorial misconduct in failing to disclose exculpatory evidence, (6) prosecutorial misconduct in vouching for the credibility of a witness for the State, (7) prosecutorial misconduct in using the testimony of a witness who had failed a polygraph examination, and (8) the imposition of consecutive habitual criminal sentences where both crimes arose out of one transaction.

The robbery took place at the Burger King Restaurant in Lincoln, Nebraska, on September 17, 1979. The robbery was perpetrated by two black men, one about 6 feet 3 inches tall and the other approximately 5 feet 7 or 8 inches tall. Both men wore homemade masks over their faces. The employees, except the manager, were ordered into a utility room in the building. The taller man brandished a gun while the shorter man ordered the restaurant manager to open the cash drawers and took the money.

On September 27, 1979, the defendant and Elizabeth Hipple were stopped by police near 49th and Claire

Streets in Lincoln, pat-searched, and taken to police headquarters for questioning concerning the Burger King robbery. After lengthy questioning Hipple gave a statement to police in which she admitted that she, the defendant, and Kevin Ginger had committed the robbery. According to Hipple, on the evening of September 16, 1979, she, the defendant, and Ginger drove around the north part of Lincoln in her automobile while the defendant and Ginger discussed robbing the Burger King Restaurant. Ginger showed Hipple a homemade mask made out of a T-shirt that he intended to wear. Hipple saw the defendant remove a pistol from his pocket, place a bullet in the chamber, and put the pistol back in his pocket.

Late that evening the car was parked at 25th and Dudley Streets, and the defendant and Ginger left the automobile. Hipple waited in the car at 25th and Dudley for an estimated 1 to 1½ hours. When the defendant and Ginger returned to the car the defendant directed her to open the trunk, and the defendant and Ginger climbed into the trunk. She then drove to Ginger's apartment. When they arrived at the apartment she opened the trunk, and the defendant and Ginger got out. Hipple stated that there was money strewn around the trunk. The three of them picked up all the money and went into Kevin Ginger's apartment where the defendant counted the money and divided it. Hipple received about $500. Hipple and the defendant spent the remainder of the night at Ginger's apartment, and left early the next morning.

Approximately five Burger King employees, including the manager, were in the building at the time of the robbery. They testified, in substance, that shortly after closing, when one of the employees was taking out the trash, two men accosted him in the alley behind the restaurant and forced him back into the building. The men ordered the employees, except the manager, into a utility room. The taller robber grabbed the manager and demanded to know where the money was. The

shorter man then took over the task of getting the money, going up to the front of the restaurant with the manager, while the tall man stood at the back, holding the gun and making threatening comments. After the shorter man had obtained the money, both men left and the police were called. The testimony of the employees corroborated Hipple's testimony as to what the defendant had told her about what had happened inside the restaurant during the robbery.

Hipple testified that while the police were following her automobile on the night of the arrest, the defendant handed a .38-caliber automatic pistol to her and asked her to hide it. Hipple hid the gun in the front of her jeans, and it was not found during the pat-search. Later, while she was being questioned at the police station, she requested permission to use the bathroom, and hid the gun in a wastebasket. Sometime later she advised her attorney about the gun. The attorney notified the police who then retrieved the gun.

In exchange for her testimony as a witness for the State, Hipple was granted immunity from prosecution "from anything that arose out of the transaction that took place involving the Burger King robbery or incidents related thereto." There was some testimony at the trial that she would not be charged with being a felon in possession of a firearm and carrying a concealed weapon, but at the end of the trial it was stipulated that "the County Attorney's Office is still empowered to file said charges."

Before the trial commenced, defense counsel made a motion in limine to forbid the State's witnesses from using the words "polygraph" or "polygraph room" in their testimony. The motion was sustained and the county attorney was ordered to advise his witnesses to use the words "interview" or "interview room" in their testimony. During the trial Detective Van Butsel used the words "polygraph room" twice in his testimony. At a hearing on the defendant's motion for a mistrial, Van Butsel testified that he had not been told by the county

attorney to not use those words. The motion for mistrial was overruled.

At trial the defendant's counsel offered evidence of other robberies which had occurred in Lincoln while the defendant was in jail and unable to post bond. The method of operation used in these robberies was similar in nature to the Burger King robbery. A motion in limine by the State to prevent the introduction of this evidence was sustained.

After arraignment, the defendant waived a preliminary hearing in exchange for the county attorney's promise to turn over all police reports concerning the robbery. At the sentencing hearing in August 1980, defense counsel discovered, from the presentence report, that he had not received a number of police reports, some of which contained material which he thought was exculpatory. Sentencing was deferred, and a motion for new trial based on newly discovered evidence was filed. After a hearing on the motion, the motion was overruled.

In his first assignment of error the defendant contends the trial court erred in sustaining the State's motion in limine regarding evidence of similar, unsolved robberies in Lincoln which were committed while defendant was in jail and unable to post bond. The defendant argues this evidence was admissible to show lack of identity because "nearly identical robberies" were being perpetrated while the defendant was in jail.

The evidence offered related to robberies at Taco John's and Marion's liquor store in Lincoln, Nebraska. These robberies were committed by two black men, one tall and one short, near closing time, and in each robbery the shorter man took the money. At the hearing on the motion, the witnesses to the Taco John's robbery were unable to give as complete a description of the robbers as was the witness to the Marion's robbery. The evidence is that the robbers at Taco John's did not wear masks, although they did at Marion's.

The State argues that the subsequent robberies were too remote in time or not sufficiently similar to the Burger King robbery for the evidence to be admissible. Generally, it is within the discretion of the trial court whether evidence of other crimes is admissible. *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). It is also within the discretion of the trial court whether other offenses are sufficiently similar to the one charged so that evidence of the other offenses has probative value.

In determining whether evidence of other crimes is admissible, important considerations are remoteness in point of time and unique, almost "signature-like" similarity between the charged crime and the other crimes. *Commonwealth v. Murphy*, 282 Mass. 593, 185 N.E. 486 (1933). In the present case, the subsequent robberies occurred at Taco John's on November 18, 1979, 2 months after the Burger King robbery, and at Marion's liquor store on January 28, 1980, 4 months thereafter. While there were similarities among elements of all the robberies, there were also a number of dissimilarities. The parties were dressed differently; in some cases they wore masks and not in others; and in only two of the robberies was a gun used. There was evidence that an employee present at the Taco John's robbery had made a positive identification of one of the robbers, but the employee did not testify at the hearing in this case. We believe the three robberies were not so uniquely similar as to be sufficiently probative of defendant's innocence of the Burger King robbery that it was an abuse of discretion to sustain the motion.

In his second assignment of error the defendant contends the trial court erred in failing to declare a mistrial when the State's witness, Van Butsel, twice used the term "polygraph room" in describing where the gun was found which Hipple had hidden in the restroom at the police station. The defendant argues that the jurors could have inferred that Hipple had been in the polygraph room, or had taken a polygraph examination. Aside from describing the basement restroom as near

the polygraph room, Van Butsel's testimony in no way connected Hipple with the polygraph room. Although Van Butsel testified that he had not been told of the court's order in limine, neither Van Butsel's testimony nor that of any other witness placed Hipple in the polygraph room, or in any way indicated that she had taken a polygraph examination. The violation of the order did not result in substantial prejudice to any of the defendant's rights.

The defendant next contends that a new trial should have been granted because the State failed to disclose statements made by Kevin Ginger, in direct violation of the court's pretrial order; because the State failed to disclose "exculpatory" material contained in police reports regarding two black males in a blue station wagon who had been hanging around the Burger King restaurant for 2 days prior to the robbery; and because of information regarding Shelley Snyder's possible complicity in the robbery of the Burger King.

The statements of Kevin Ginger, which were not furnished to the defendant, contained a version of events taking place immediately before the robbery which was substantially at variance with the testimony of Hipple.

The reports concerning the blue station wagon and the possible complicity in the robbery by Shelley Snyder, a Burger King employee, were not in the possession of the county attorney until the sentencing hearing, 4 months after trial.

Although Kevin Ginger's statement contained in the police report conflicted with Hipple's testimony, it implicated the defendant in the Burger King robbery. In *Evans v. Janing*, 489 F.2d 470 (8th Cir. 1973), the Eighth Circuit stated: "[T]he sole purpose for which the police report might have been used in evidence would have been to impeach the testimony of the key witness. . . [S]uppressed *impeachment evidence* requires a higher standard of materiality than would be imposed for evidence directly related to guilt. 'As to evidence [admissible] only for the purpose of impeachment or

credibility attack, nondisclosure or suppression, to be violative of due process, would in our opinion, unless the situation is otherwise tainted, have to be of such inherent significance as to represent fundamental unfairness.'"

In *United States v. Agurs*, 427 U.S. 97, 111-13, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the U.S. Supreme Court stated: "[T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. . . . [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

Hipple's out-of-court statements made prior to trial contained a number of inconsistencies as compared to her testimony at trial. She was cross-examined thoroughly as to them by the defendant's counsel in an attempt to impeach her credibility. When the record as a whole is considered, the evidence against the defendant was substantial. We do not believe the suppression of the police report containing the statements of Ginger was prejudicial to the defendant.

As to the other "exculpatory material" contained in the police reports, the parties admit that the county attorney did not have these reports in his possession until long after trial. The information about the blue station wagon and the possible complicity of Snyder were early leads which the police abandoned. In *Moore*

v. Illinois, 408 U.S. 786, 795, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1971), the U.S. Supreme Court stated: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. Here, the elusive 'Slick' was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore's presence at the Ponderosa were found." The "exculpatory material" contained in the police reports was at best vague and insubstantial. Even if the county attorney had known of these reports before trial, the failure to disclose them to the defense would not have been prejudicial error.

The defendant's fourth assignment of error is that the trial court erred in not granting a new trial because of the State's failure to disclose the true nature of the plea bargain made with Elizabeth Hipple in exchange for her testimony. This assignment is argued in conjunction with the assignment that the trial court erred in not granting a new trial because of "prosecutorial misconduct in presenting the testimony of Elizabeth Hipple as true, when the prosecutor knew that she had failed a polygraph examination regarding her involvement in the robbery."

The defendant contends that conflicting statements made by the county attorney as to the extent and nature of Hipple's plea bargain constituted "false evidence" knowingly presented by the State.

Of the charges which could have been filed against Hipple, robbery and use of a firearm had definitely been dropped in exchange for her testimony. As to carrying a concealed weapon and felon in possession of a firearm, the parties stipulated that the county attorney was still empowered to file those charges against her. If this constituted "false evidence," any error was waived by the stipulation.

The defendant contends the county attorney incorrectly stated the nature of immunity available under Nebraska law in his closing argument and that this was

prejudicial to the defendant. We believe the allusion to "use immunity" in the final argument was not prejudicial. In *Kennedy v. State*, 171 Neb. 160, 175, 105 N.W.2d 710, 720 (1960), we said: "'Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct.'" In *State v. Ellis*, 208 Neb. 379, 398, 303 N.W.2d 741, 753 (1981), we said: "'Although the prosecutor was less than artful at times, it does not appear that his conduct was meant to, or did, inflame the prejudices or excite the passions of the jury against the defendant.'"

The defendant also contends that the prosecutor knowingly presented false evidence by allowing Elizabeth Hipple to testify when he knew that she had failed a polygraph examination on the night of her arrest. After taking the polygraph examination, Hipple changed her story and admitted her participation in the robbery, which she had denied while taking the test.

The testimony Hipple gave at trial included her acknowledgment of her own participation in the robbery. The only time she denied her participation was before and during the polygraph examination on the night of her arrest. The same night, she admitted her own participation and continued to do so from then on.

As was noted in *State v. Oglesby*, 188 Neb. 211, 212, 195 N.W.2d 754, 755 (1972): "The fact an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction." As we said in *State v. Leisy*, 207 Neb. 118, 128, 295 N.W.2d 715, 722 (1980): "The facts concerning [the accomplice's] background, motivation, credibility, and inconsistent statements were all before the jury. It was for them to determine the truth." The trial court did not err in refusing to grant a new trial on this ground.

The defendant's sixth assignment of error is that the trial court erred in not granting a new trial because of "prosecutorial misconduct in repeatedly vouching for the credibility of Elizabeth Hipple during questioning and during his statements to the jury."

The county attorney elicited from Hipple the fact that she understood that testifying for the State in this case meant giving testimony against the defendant, and that she understood that she was not immune from prosecution for perjury. In his closing argument the county attorney again noted that Hipple was not immune from prosecution for perjury. The defendant contends this testimony and the closing remarks amounted to the prosecutor "vouching for the credibility" of Hipple's testimony.

Kennedy v. State, supra, states at 175, 105 N.W.2d at 720-21: "'An argument by a prosecuting attorney, which is based on the evidence and inferences drawn therefrom, does not ordinarily constitute misconduct.'" Hipple's testimony as to the conduct of the robbery substantially tracked the testimony of the eyewitnesses. From this the jury could infer that Hipple was telling the truth. The testimony and argument that she was not immune from prosecution for perjury was no more than a correct statement of the law. Neb. Rev. Stat. § 29-2011.01 (Reissue 1979). The trial court did not err in refusing to grant a new trial on this ground.

The defendant's final assignment of error is that the District Court erred in imposing consecutive habitual criminal sentences of 10 years on both counts when the two crimes arose out of the same incident. His argument is that the use of a firearm in the commission of a felony statute, Neb. Rev. Stat. § 28-1205 (Reissue 1979), is an enhancement statute, and that by finding the defendant to be an habitual criminal as to both the robbery and the firearms-use statute, the defendant's sentence was doubly enhanced. The defendant likens the situation to the statute which makes third-offense driving while intoxicated a felony, while the first two offenses are

misdemeanors. Neb. Rev. Stat. § 39-669.07 (Reissue 1978).

The fallacy is in the defendant's argument that his sentence is being "doubly enhanced for one offense." Section 28-1205, which forbids the use of a firearm in the commission of a felony, specifically states: "(3) The crime defined in this section shall be treated as a separate and distinct offense from the felony being committed . . . ." Even though the two charges of which defendant was convicted arose out of the same transaction, they were separate and distinct offenses. The defendant's "double enhancement" argument is without merit, and the sentence was proper.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J. and CLINTON, J., concur in result.

WILLIAM R. KOCH, APPELLEE, V.
SANDRA L. KOCH, APPELLANT.

312 N.W.2d 294

Filed November 6, 1981. No. 44056.

1. **Child Custody.** In determining the question of which parent should have care and custody of the minor child upon the dissolution of a marriage, the paramount consideration must be the best interests of the child.
2. **Child Custody: Appeal and Error.** In evaluating the general concept of the best interests and welfare of the child, it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at the trial.
3. **Child Custody.** Among the factors to be considered in determining the best interests of a child are consideration as to the moral fitness of the parents, the respective environments offered by each parent, the emotional relationship between the child and its parents, and the age, sex, and health of the child.
4. ____. When a controversy arises between the natural parents as to the custody of a minor child, no presumption shall exist that one parent is more fit to have custody than the other.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Timothy J. Augustyn of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant.

William E. Gast of Gast & Kielty for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and STANLEY, District Judge.

BRODKEY, J.

Sandra L. Koch has appealed from an order of the District Court of Douglas County, Nebraska, dissolving the marriage of the parties and awarding custody of their minor child to the father, William R. Koch, with visitation rights to the mother, Sandra. The only assignment of error alleged by the appellant is that the order of the District Court is contrary to the law and against the clear weight of the evidence adduced at trial. We affirm.

The record reveals that the parties were married in Omaha, Nebraska, on August 24, 1974, and had one child, Cassandra Lee Koch, born October 15, 1976. Since the time of his marriage, William has been continuously employed as a dockworker with an Omaha truckline company, working the 4 a.m. to 12:30 p.m. shift. Sandra worked as a grocery store clerk and at a local clothing company after the marriage until she became pregnant. The appellant stayed at home with the child for 2 years after the child was born.

It appears that the parties' marital relationship began to deteriorate after the appellant returned to the work force in April of 1979. The appellant blames the deterioration on the time William spent in repairing cars and adding an addition to the house. During the period between April 1979 and the time of the trial in October of 1980, Sandra obtained employment at four separate businesses in the Omaha area. The evidence also discloses that during this period Sandra became involved in an extramarital relationship with another man.

The parties attempted counseling to resolve their

marital difficulties. After one visit, however, the psychiatrist informed William that he need not return. The doctor also informed Sandra that she should end her extramarital relationship, which she did for a short time; however, she admitted to reentering the relationship. Finally, in May of 1980, Sandra took her child and separated from her husband.

On July 2, 1980, William filed a petition for dissolution of marriage. The parties agreed to a temporary order for support and attorney fees, and the temporary custody of the child was granted to Sandra. In the final decree of the dissolution, entered by the trial court on November 21, 1980, custody of Cassandra was awarded to William, subject to reasonable rights of visitation by the respondent, Sandra. In addition, the court ordered that Sandra was not obligated to pay child support.

In determining the question of which parent should have care and custody of a minor child upon the dissolution of a marriage, the paramount consideration must be the best interests of the child. *Kringel v. Kringel*, 207 Neb. 241, 298 N.W.2d 150 (1980); *Curfman v. Curfman*, 207 Neb. 1, 295 N.W.2d 299 (1980); *Whitlatch v. Whitlatch*, 206 Neb. 527, 293 N.W.2d 856 (1980); *Sikes v. Sikes*, 205 Neb. 441, 288 N.W.2d 43 (1980). As was noted in *Christensen v. Christensen*, 191 Neb. 355, 215 N.W.2d 111 (1974), the judgment concerning the best interests of a child is quite subjective in nature and, this being so, many factors must be considered in light of the circumstances of each particular case. The general considerations of the moral fitness of the parents, the respective environments offered by each parent, the emotional relationships between the child and its parents, and the age, sex, and health of the child are some of the many factors for the court to consider. In evaluating the general concept of the best interests and welfare of the child, it is settled law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at trial. In addition, this court has stated that sexual mis-

conduct is a factor, although not necessarily determinative, which may be properly considered in determining the best interests of the child. *Ahlman v. Ahlman*, 201 Neb. 273, 267 N.W.2d 521 (1978); *Lockard v. Lockard*, 193 Neb. 400, 227 N.W.2d 581 (1975).

We have also stated the general rule to be that when a controversy arises between the natural parents as to the custody of a minor child, no presumption shall exist that one parent is more fit to have custody of the child than the other. *Turner v. Turner*, 205 Neb. 6, 286 N.W.2d 100 (1979). See, also, Neb. Rev. Stat. § 42-364(2) (Reissue 1978).

In the decree entered in this matter, the court found that both parties were fit and proper persons to have the care, custody, and control of Cassandra, but that the best interests of the child would be served by awarding custody to the father. At trial, the court made it clear that its findings were not based on the extramarital relationship maintained by the appellant. The evidence adduced at trial clearly supports the order of the court. Evidence as to the living environment of the parties reveals that William demonstrated a healthy daily routine during the time the parties were married. William did most of the household chores, washed the clothes, bathed Cassandra, read to her, and did the dishes. The appellee has maintained steady employment and his parents have indicated a willingness to assist him with the upbringing of his daughter.

The evidence in regard to the appellant reveals that she did not maintain a clean living environment; and her own mother, Barbara Fulkerson, testified that Sandra did not maintain a clean house. The appellant has not maintained stable employment and has indicated uncertainty as to her future finances. She has indicated a willingness to find a roommate, but has no one definite in mind. The appellant's sister has offered to live with her, but it was indicated that she would be getting married shortly after the trial. The evidence is unclear as to both the stability of the home environment and the

proper financial support that Cassandra could expect to receive from her mother.

The discretion of the trial court in the granting or changing of custody of minor children, while subject to review, will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. *Allen v. Allen*, 198 Neb. 544, 253 N.W.2d 853 (1977). From a review of the entire record, the trial court gave full and studied consideration to the best interests of Cassandra, and there is no showing that the trial court abused its discretion.

The award of custody to William is supported by the weight of the evidence, and we therefore affirm the judgment of the trial court.

AFFIRMED.

IN RE INTEREST OF KENNY EUGENE AND RANDY ALAN HITT, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JOY DELLA HITT, APPELLANT.

312 N.W.2d 297

Filed November 6, 1981. No. 44122.

1. **Parental Rights.** An order of the juvenile court terminating the parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be based on clear and convincing evidence or it must be reversed.
2. ——. The right of parents to maintain custody of their child is a natural right, subject only to the paramount interests which the public has in the protection of the rights of a child.
3. ——. A court of this state may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.

Appeal from the Separate Juvenile Court of Douglas County. Reversed and remanded with directions.

Roger R. Holthaus for appellant.

Donald L. Knowles, Douglas County Attorney, and

Francis T. Belsky for appellee.

Barbara L. Hosford, guardian ad litem.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

Joy Della Hitt (mother), the natural mother of Kenny Eugene Hitt and Randy Alan Hitt, appeals from an order entered by the separate juvenile court of Douglas County, Nebraska, terminating her parental rights to her minor children. She assigns as error the fact that the trial court erred in ruling that the remarriage of short duration by appellant to the natural father of the children, who had been previously denied visitation rights with his children and whose parental rights were subsequently terminated, caused the children to come within the meaning of Neb. Rev. Stat. § 43-209(2) (Reissue 1978) in that the mother has substantially and continuously or repeatedly neglected the children and refused to give them necessary parental care and protection. We agree with the position tendered by the mother and reverse the action of the separate juvenile court.

An order of the juvenile court terminating the parental rights under § 43-209 must be based on clear and convincing evidence or it must be reversed. See, *In re Interest of Kimsey*, 208 Neb. 193, 302 N.W.2d 707 (1981); *In re Interest of Hiatt*, *ante* p. 195, 307 N.W.2d 108 (1981).

Furthermore, the right of parents to maintain custody of their child is a natural right, subject only to the paramount interests which the public has in the protection of the rights of a child. See *In re Interest of Kimsey*, *supra*. A court of this state may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. *In re Interest of D.*, *ante* p. 529,

308 N.W.2d 729 (1981).

Unfortunately, as is too often the situation in cases of this type, the in-court testimony by live witnesses is relatively scant. The bulk of the evidence was based on conclusionary letters from various agencies, which were not subject to cross-examination. We have previously indicated that if this court is to be able to examine the record de novo in order to determine that the evidence justifying the termination of parental rights is clear and convincing, something more than informal reports must be offered in evidence. Nevertheless, the evidence in this case, such as it is, is virtually without dispute.

Based upon our examination of the record, we are unable to conclude that either the best interests of the children require that the mother's parental rights be terminated or that the evidence to support that position is clear and convincing.

The evidence discloses that the mother was, for some 5 years prior to April of 1980, a chronic alcoholic. For a period of several months in 1978 and 1979, after the mother was divorced from the father, the father, by arrangement with the mother, had custody of the minor children. It was, in part at least, during that time, while the minor children were with the father, that the father committed a series of sexual assaults upon the children which ultimately resulted in the court terminating his parental rights to the children and sentencing him to the penitentiary for sexual assault on the children. On appeal to this court, the action in sentencing the father to the penitentiary was affirmed. See *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981).

Initially, a petition and motion seeking temporary custody of the children were filed by the county attorney against both the father and the mother alleging the father's abuse and the mother's failure to protect the children. A hearing on the petition seeking temporary custody was held on April 18, 1979,

and temporary custody was placed in the county. However, the mother was granted reasonable rights of visitation with the children, which she regularly exercised. A further hearing on the petition was held on November 5, 1979. Following that hearing the court, on December 27, 1979, found that grounds existed to terminate the parental rights of the father but not the mother. The court found that events which occurred prior to November 5, 1979, were insufficient to terminate the mother's parental rights, though sufficient to find that the children were neglected and dependent. The court continued jurisdiction over the children and granted the mother continuing rights of visitation. On February 15, 1979, the court entered an order terminating the father's parental rights. During all of this time, the mother was granted rights of visitation with the children, which she exercised at least in part.

The record further reflects that on January 11, 1980, while the mother was in the midst of a drinking bout, she remarried her former husband. It is unclear whether she ever lived with him following the remarriage. However, at no time during the entire brief remarriage were the children living with the mother or exposed to the father.

Nevertheless, based solely upon the fact that the mother had remarried, the county attorney filed a petition to terminate the parental rights of the mother. Apparently, the action of the county attorney was not without effect. Upon learning of the action taken by the county attorney, the mother set about once and for all to attempt to rehabilitate herself. Sometime in April of 1980 she had herself admitted to the Cherokee Mental Health Institute to begin treatment for her alcoholism. There she remained and was rehabilitated.

A hearing on the motion to terminate was held on July 31, 1980. At that time the county attorney offered in evidence the marriage certificate, and rested.

At the disposition hearing on August 25, 1980, the

State offered several written reports. The State's first exhibit was a report dated August 12, 1980, and signed by Dr. Beverly Mead, consulting psychiatrist. The report was solely with regard to Kenny and provided in part: "While it is not our custom to make recommendations, but to instead present only facts as they are documented in our files, it is felt that this particular case warrants special consideration due to Ken's strong feelings and ties to his mother. Therefore, the staff at Saratoga 01, in consultation with Dr. Mead, make the following recommendations which should be considered as a unit or package:

"One: Ken should be placed in foster care as soon as a suitable placement can be found.

"Two: It is felt that for the above reasons Ken's mother should retain visitation rights as allowed by the laws of Nebraska and the normal procedures of the foster care program."

Exhibit 2 was a letter signed by Mr. Todd J. Bruett, coordinator, Child & Family Psychiatry Services. Among the recommendations was the following: "That both boys, if possible, be allowed to maintain some type of contact with their biological mother. Kenny's attachment to his mother appears to be stronger than Randy's but both would profit should Mrs. Hitt continue to progress."

Exhibit 3 was a report signed by Michael J. Meredith, Douglas County Social Services. While the report recommends termination of the mother's parental rights, there is little factual basis upon which the determination is based. The report concludes by saying: "Despite Mrs. Hitt's current improvement I seriously doubt the family can ever be successfully reunited. The seperation [sic] of over 16 months is the primary reason for this. The vast improvement shown by both boys, especially Randy, indicates that it would be in their best interests to terminate their mother's parental rights."

Exhibit 4 was a letter from Nebraska Children's

Home Society to the court concerning Randy. It made no recommendation concerning the mother's parental rights.

The mother also testified at the hearing that she realized the problem that she had previously had with alcohol and admitted that she was indeed an alcoholic. She further testified, however, that she had made significant strides with regard to her drinking and that she believed she did in fact now have it under control. She stated that she had strong and adverse feelings toward her former husband and that if he appeared she would call the police and have him arrested. Her testimony was supported by Nancy Zimbra, social worker for Cherokee Mental Health Institute.

Based upon this meager record, the court entered an order terminating her parental rights. As we have previously indicated, we believe that the evidence simply will not support the action of the trial court. If the record reflects anything, it reflects that at the time the court determined to terminate the parental rights, the mother had made a substantial and important improvement in both her own physical condition and her relationship with the children. The mere fact that the mother, in a moment of intoxication, foolishly remarried the father, absent any other evidence indicating that the father was thereby given the opportunity to have access to the children, does not justify finding the mother unfit nor justify terminating her parental rights. Quite to the contrary, the evidence is somewhat encouraging that the mother has indeed attempted to put her life together and, with continued care from others, can indeed become a real mother to the children. The State should afford her the opportunity to do so.

It appears to us that at the very moment the mother has finally shown some strength regarding her own life and the life of her children, she is rejected by the court. The record does not seem to justify such action. If the

mother can continue in the future as she has in the immediate past, there is no reason to believe that she will not be an adequate mother to her minor children.

The evidence, at the present time, does not, however, indicate that the mother is able to assume all the responsibility for the care and maintenance of her minor children. It would therefore appear to be appropriate that her parental rights be restored, but that the county retain temporary custody of the children and keep them in foster care. A program should be developed, however, whereby visitation and contact between the mother and her two minor children are permitted whenever possible, to the end that, through aid of the county, the mother can have permanent custody of her children once again in the not-too-distant future. The order of the separate juvenile court terminating the parental rights of the mother is reversed and the matter is remanded to the separate juvenile court with directions to develop a program whereby the mother may exercise broad visitation rights with the minor children and may attempt, at the earliest possible moment, to regain permanent custody of her minor children. Should such efforts prove unsuccessful, the county has sufficient authority to take necessary and appropriate action at that time.

REVERSED AND REMANDED WITH DIRECTIONS.

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Acknowledgments.

A mortgage on real estate, other than as to the homestead, executed and delivered by the mortgagor is valid between the parties, even though it was not lawfully acknowledged. O'Neill Production Credit Assn. v. Mitchell 206

Actions.

1. Where the loan receipt under which the insurer advances money to an insured obligates the insurer to bear the expense of all legal proceedings pursued in prosecuting the claims of the insured which the insured has pledged to the insurance company, it is improper to charge the insured with any of the expenses of litigation. Hammond v. Nebraska Nat. Gas Co. 616
2. An insurer which recovers, on behalf of its insured in a negligence action brought against a third person, the amount which the insurer has paid the insured is entitled to the judgment interest awarded on that amount, even though the loan receipt under which the insurer advanced funds to the insured provides that the loan is without interest, as such interest is not paid directly or indirectly by the insured but is paid by the third party with whom the insured has ceased to have concern and privity. Hammond v. Nebraska Nat. Gas. Co. 616

Adverse Possession.

1. To claim by adverse possession, the claimant must show by a preponderance of the evidence actual, open, exclusive, and continuous possession under a claim of ownership for 10 years. Wiedeman v. James E. Simon Co., Inc. 189
2. To gain title by adverse possession against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. Wiedeman v. James E. Simon Co., Inc. 189
3. Sufficiency of possession depends upon the character of the land and the use that can reasonably be made of it. Wiedeman v. James E. Simon Co., Inc. 189
4. When a fence is constructed as a boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the claimant gains title to such land by adverse possession. Wiedeman v. James E. Simon Co., Inc. 189
5. A prescriptive right is not looked upon with favor, and generally must be proved by clear, convincing, and satisfactory evidence. Sturm v. Mau 865

6. To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land. Sturm v. Mau 865
7. Ordinarily, where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficent to acquire an easement by adverse user, the use will be presumed to be under a claim of right. Under such circumstances, the owner of the servient estate, in order to avoid acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive. Sturm v. Mau 865
8. The presumption of adverse use does not arise when a prescriptive easement is claimed over land which is unenclosed and which has no defined pathway across it. Sturm v. Mau 865
9. If the initial entry is adverse, an actual claim of ownership is not necessary to establish a claim of right. Sturm v. Mau 865
10. If adverse possession continues for the required 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances affirmatively showing the contrary, such as occupancy under a lease, an easement, or a permissive use; the title of the true owner is lost by his inaction. Sturm v. Mau 865
11. It is not indispensable to the establishment of a highway by prescription that there be no deviation in the line of travel; if the course of travel has remained substantially unchanged for the full period, it is sufficent even though at times, to avoid encroachments, obstructions, or the like, there have been slight changes in the line of travel. Sturm v. Mau . 865
12. A diminution in the number of users does not constitute an abandonment of a road acquired by prescription. Sturm v. Mau 865

Affidavits.

1. As a general rule, an affidavit is not admissible to establish facts material to the issue being tried. Doyle v. Union Ins. Co. 385
2. Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was creditable or his information reliable. State v. Meyer ... 757
3. An affidavit for a search warrant is not defective simply

because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay. Firsthand knowledge of an informant, acquired by sight or hearing, is self-corroborating and tends to fulfill both aspects of the *Aguilar* test. State v. Meyer 757
4. An affidavit is sufficient if it contains a full and complete statement of the underlying factual circumstances which justify the issuance of an order authorizing a wiretap. State v. Lozano 772
5. Staleness is an issue which must be decided on the peculiar facts of each case. State v. Lozano 772
6. Documents incorporated into an affidavit by reference need not be sworn to separately. State v. Lozano 772

Aiding and Abetting.

Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient. State v. Loveless 583

Alimony.

1. In determining whether alimony should be awarded, the ultimate test is one of reasonableness.
   Watkins v. Watkins 14
   Johnson v. Johnson 317
2. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Kullbom v. Kullbom 145
3. A judgment of the trial court fixing the amount of alimony or making distribution of the property will not be disturbed on appeal in the absence of an abuse of discretion. Kocarnik v. Kocarnik 454

Appeal and Error.

1. In an action in equity, it is the duty of the Supreme Court to try the issues de novo upon the record and to reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination con-

stituted evidence tending to influence belief or unbelief of the matters at issue in the case.
Schmidt v. Chimney Rock Irrigation Dist. 1
McDonald's Corp. v. Markim, Inc. 49
O'Neill Production Credit Assn. v. Mitchell 206
Knoell Constr. Co., Inc. v. Hanson 461
Sturm v. Mau 865
2. In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. In re Interest of Wagner and Russell 33
3. The judgment of the trial court in a law action where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong.
Moss v. Speck 46
Honstein Trucking v. Sandhills Beef, Inc. 422
Crawford v. Ham 802
In re Estate of Schoch 812
B Town, Inc. v. Albright 819
4. An appeal of a juvenile case to this court is heard de novo upon the record; and the findings of fact by the trial court which heard and observed the witnesses and parties are accorded great weight and will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
In re Interest of J.L.L. 76
In re Interest of Kain 229
5. In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low. LaGord Assoc. v. County of Cass 99
6. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. LaGord Assoc. v. County of Cass 99
7. For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. Sharski 122

8. Dissolution of marriage actions are tried de novo on the record; however, this court, in reaching its decision, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Kullbom v. Kullbom . 145
9. It is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Farr 163
State v. Rolling 243
State v. Holloman 828
10. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Rolling 243
11. In a workmen's compensation case, the findings by the Workmen's Compensation Court have the force and effect of a jury verdict and will not be set aside unless clearly wrong.
Osteen v. A.C. and S., Inc. 282
Riha v. St. Mary's Church & School, Inc. 539
12. An order overruling a special appearance is not a final order from which an appeal can be taken. State v. Jones 296
13. In the absence of a final order which disposes of a case, this court has neither authority nor jurisdiction to act on an attempted appeal and the same will be dismissed. State v. Jones 296
14. Where the record affirmatively shows that the only ruling complained of is clearly right and plainly in accordance with law, an appeal will be dismissed as frivolous. State v. Jones 296
15. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
Johnson v. Johnson 317
Redmond v. Redmond 745
16. Errors assigned but not discussed will generally not be considered by the Supreme Court. Johnson v. Johnson 317
17. In a proceeding brought under the Political Subdivisions Tort Claims Act, the findings of fact by the trial court will not be overturned unless clearly wrong. Lee v. City of Omaha 345
18. When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given.
Lane v. State Farm Mut. Automobile Ins. Co. 396
Wooley v. Kittle 669

19. Instructions must be taken as a whole and construed together, and where the instructions covered the issues and fairly submitted the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous. Lane v. State Farm Mut. Automobile Ins. Co. 396
20. The trial court ordinarily has a better opportunity for practically appraising the award of attorney fees, and an appellate court will only interfere to correct a patent injustice where the allowance is clearly excessive or insufficient. Lane v. State Farm Mut. Automobile Ins. Co. 396
21. Upon an appeal from an order of the commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made. In re Application of Greyhound Lines, Inc. 430
22. This court will not disturb an order of the commission based on evidence unless the evidence shows that the order was unreasonable or arbitrary. In re Application of Greyhound Lines, Inc. 430
23. Filing of a notice of appeal in this court vests exclusive jurisdiction in this court. State v. Ditter 452
24. In the absence of a motion for new trial in a criminal case, the only issues remaining for argument are whether the pleadings support the judgment and whether the judgment is excessive. State v. Ditter 452
25. A judgment of the trial court fixing the amount of alimony or making distribution of the property will not be disturbed on appeal in the absence of an abuse of discretion. Kocarnik v. Kocarnik 454
26. An appeal to the District Court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
27. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. Lincoln Tel. & Tel Co. v. County Board of Equalization 465
28. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Trout v. Olson Bros. Mfg. Co. 477
29. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Trout v. Olson Bros. Mfg. Co. 477
30. A sentence imposed which is within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Jackson 486
31. An information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it

be said to charge the offense of which the accused was convicted. State v. Lingle 492
32. A complaint charging a statutory misdemeanor substantially in the language of the statute will be liberally rather than technically construed, and if a defect is amendable, it will be held sufficient on appeal in the absence of objection in the trial court. State v. Lingle 492
33. When complaint is made of the refusal of the District Court to give an instruction asked, the burden is upon the party complaining to show not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case. State v. Lingle 492
34. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. Herman Bros., Inc. v. Spector Industries, Inc. 513
35. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.
Herman Bros., Inc. v. Spector Industries, Inc. 513
In re Application of Best 524
36. The trial court has no jurisdiction to enter an order after the defendant has perfected his appeal to the Supreme Court. Beavers v. Graham 556
37. An action for termination of parental rights is reviewed by this court de novo upon the record. In re Interest of Bird Head 575
38. Failure to object to instructions after they are submitted to counsel for review precludes raising objections to said instructions on appeal. Wooley v. Kittle 669
39. Under Neb. Ct. R. 8.a.2.(3) (Rev. 1977), we may, on appeal, notice plain errors not assigned. In re Interest of Burbanks and Rima 676
40. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the judgment or decree or the making of the final order. Novak v. Nelsen 728
41. The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion. Stephen v. City of Lincoln 792

42. In reviewing an appeal from the decision of a trial court in a law action, the review is not de novo. The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence. Crawford v. Ham 802
43. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
Crawford v. Ham 802
In re Estate of Schoch 812
B Town, Inc. v. Albright 819
44. An information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted. State v. Coleman 823
45. Findings of fact made by the District Court in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977), will not be disturbed on appeal unless clearly wrong. Watson v. City of Omaha .. 835
46. Error may not be predicated upon a ruling which excludes evidence, unless a substantial right of the party is affected. Sturm v. Mau 865
47. The scope of review in the Nebraska Supreme Court for findings of fact made by the three-judge panel of the Nebraska Workmen's Compensation Court after rehearing is that those findings of fact shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. Engel v. Nebraska Methodist Hospital 878
48. In evaluating the general concept of the best interests and welfare of the child, it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at the trial. Koch v. Koch 896

Appearance Bonds.

A defendant who is released following imposition of sentence to reappear upon further order of the court has been "released from custody under . . . a conditioned release" within the meaning of Neb. Rev. Stat. § 29-908 (Reissue 1979). State v. Robinson 726

Arrests.

1. An arrest is taking custody of another person for the purpose of holding or detaining him to answer a criminal charge. It is

defined as the taking, seizing, or detaining of the person of another. State v. White 218
2. To effect an arrest there must be actual or constructive seizure or detention of the person arrested, or his voluntary submission to custody, and the restraint must be under real or pretended legal authority. State v. White 218
3. Constructive, as distinguished from physical, restraint sufficient to constitute a constructive seizure or detention of an arrestee exists where an officer has the intention to effect an arrest, that intention has in some way been communicated to the arrestee, the arrestee understands that he is under legal restraint, and the officer has the apparent present power to control the person even though he has not yet asserted physical control. State v. White 218
4. A touching is not necessarily essential to effectuate an arrest. State v. White 218
5. A lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Resisting arrest is not a lesser-included offense of escape for, among other reasons, the crime of escape does not necessarily involve the use of force. State v. White 218
6. Neb. Rev. Stat. § 28-416(6)(a) (Reissue 1979) merely authorizes the issuance of citation in the case of certain violations and does not prohibit a police officer from arresting the offender whenever otherwise authorized by law. State v. Watts 371
7. The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search. State v. Watts 371
8. In making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances. State v. Lingle 492
9. The officer is not required to determine at his peril the precise amount of force necessary in each instance and to use that much and no more, and he may be guided by the reasonable appearances and the nature of the case in determining the amount of force to be used. State v. Lingle 492
10. The reasonableness of the force used in effecting an arrest is a question for the jury. State v. Lingle 492
11. The test of probable cause for a warrantless arrest is whether, at the moment, the facts and circumstances within

the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. State v. Nowicki 640

12. Probable cause is to be evaluated by the collective information of the police engaged in a common investigation. State v. Nowicki 640

Assault.

Multiple injuries including a cerebral concussion and nasal fracture constitute serious bodily injuries which will support a conviction for first degree assault under Neb. Rev. § 28-308(1) (Reissue 1979). State v. Sare 91

Attachments.

Upon dissolution of an attachment, ordinarily all property attached should be returned to the defendant owner. Ceres Fertilizer, Inc. v. Beekman 447

Attorney Fees.

1. Either the county court or the District Court on appeal ordinarily has discretionary power and authority to order payment of costs and, in proper cases, to order payment of reasonable fees to attorneys for services rendered to a good faith trustee out of the trust estate in litigation. In re Guardianship of Bremer 267
2. There is no rule which requires a trial court to necessarily award attorney fees in accordance with the value of the services in a divorce case. The award of attorney fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Johnson v. Johnson 317
3. An attorney's claim for professional services against persons sui juris, or against the property of such persons, must rest upon a contract of employment, express or implied, made with the person sought to be charged or with his agent. Doyle v. Union Ins. Co. 385
4. In determining the award of attorney fees, the court *may consider* the actual agreement existing between a litigant and his attorney, including an obligation to pay a contingent fee, particularly if such contract is customary in the locality. However, such agreement is neither the sole factor nor a factor to be given any greater weight than any other factor. The test is whether the fee is reasonably compensatory for the services rendered. Lane v. State Farm Mut. Automobile Ins. Co. 396

5. The trial court ordinarily has a better opportunity for practically appraising the award of attorney fees, and an appellate court will only interfere to correct a patent injustice where the allowance is clearly excessive or insufficient. Lane v. State Farm Mut. Automobile Ins. Co. 396
6. The award of attorney fees and the taxing of costs is discretionary with the District Court. Kocarnik v. Kocarnik 454
7. Under the "common fund" doctrine, where the holder of subrogation rights does not come into the action, whether he refuses to do so or acquiesces the action brought by the plaintiff, but accepts the avails of the litigation, he is subjected to his proportionate share of the expenses thereof, including attorney fees. However, this rule is not applicable where the party sought to be charged has employed his or its own attorney and has actively participated in the litigation, and such counsel has not terminated, abandoned, or acquiesced in the representation of his client by other counsel. Hammond v. Nebraska Nat. Gas Co. 616

Attorneys' Liens.

To be entitled to an attorney's lien under Neb. Rev. Stat. § 7-108 (Reissue 1977), it is first necessary that an attorney-client relationship, either express or implied, exists. Hammond v. Nebraska Nat. Gas Co. 616

Bonds.

A bond does not cover defaults of the principal occurring prior to the effective date of the bond, unless the bond expressly provides otherwise, for it cannot be assumed that the surety intended to be bound by the past delinquencies of the principal. Stock v. Meissner 636

Breach of Warranty.

1. A purchaser of goods under the Uniform Commercial Code claiming a breach of warranty must prove not only the warranty and the breach thereof; he must also prove the cause of the loss and the extent thereof. Settell's, Inc. v. Pitney Bowes, Inc. 26
2. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as warranted. Settell's, Inc. v. Pitney Bowes, Inc. 26

Brokers.

1. A broker is not entitled to a commission from a seller for producing a ready, willing, and able buyer, where the buyer is only willing to execute an option and the seller does not

prevent exercise of the option. DaLee Realty, Inc. v. Kuhl 6
2. A broker earns his commission and becomes entitled thereto when he produces a purchaser who is ready, able, and willing to purchase at a price and upon terms specified by the principal or satisfactory to him. Oehlrich v. Gateway Realty of Columbus, Inc. 417

Causes of Action.

A cause of action has been defined as consisting of a primary right possessed by the plaintiff and a corresponding duty devolving upon the defendant, combined with a delict or wrong done by the defendant. Gaspar v. Flott 260

Child Custody.

1. The public has a paramount interest in the protection of children from abuse and neglect. In re Interest of Wood and Linden 18
2. The principal concern in custody cases is the best interests of the child.
   In re Interest of Wood and Linden 18
   Wible v. Wible 708
3. In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. In re Interest of Wagner and Russell 33
4. A decree awarding custody of a minor child and fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the child. Helgenberger v. Helgenberger 184
5. Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative. The nature of the act or acts, the circumstances surrounding the commission thereof, and the probable effects as are related to the future welfare of the children must be carefully considered. Helgenberger v. Helgenberger 184
6. While there may be no direct affirmative evidence of child abuse, where there is ample evidence of neglect and a lack of proper parental care directly and adversely injurious to the health, safety, and well-being of the child, the best interests of the child become paramount. In re Interest of Hiatt .. 195
7. When a controversy arises between the natural parents as to the custody of minor children, no presumption shall exist that one parent is more fit to have custody of the children than the other.

Kocarnik v. Kocarnik 454
Koch v. Koch 896

8. A child custody proceeding includes "any action which results in the termination of the parent-child relationship." 25 U.S.C.A. § 1903 (Supp. 1963 to 1980). In re Interest of Bird Head 575
9. In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
Wible v. Wible 708
Koch v. Koch 896
10. Above all other considerations in determining the question of who should have custody of a minor child upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the child. Wible v. Wible 708
11. In evaluating the general concept of the best interests and welfare of the child, it is settled and fundamental law that this court will give weight to the fact the trial judge saw and observed the witnesses and the attitude of the parties at the trial. Koch v. Koch 896
12. Among the factors to be considered in determining the best interests of a child are consideration as to the moral fitness of the parents, the respective environments offered by each parent, the emotional relationship between the child and its parents, and the age, sex, and health of the child. Koch v. Koch 896

Child Support.

1. A decree awarding custody of a minor child and fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the child. Helgenberger v. Helgenberger 184
2. Where the custodial parent has removed the minor children from the jurisdiction of the trial court, the costs of exercising reasonable visitation by a noncustodial parent is a factor which may be considered along with all other attendant circumstances in determination of a modification of an existing award for child support. Harb v. Harb 875

Collateral Estoppel.

A prior criminal proceeding can work a collateral estoppel in a subsequent civil proceeding, if the question involved is distinctly put in issue and directly determined in the criminal action. Fowler v. Nat. Bank of Commerce 861

Colleges and Universities.

The Scholarship Award Program, provided by Neb. Rev. Stat. §§ 85-980 to 85-9,102 (Cum. Supp. 1980), does not violate Neb. Const. art. VII, § 11, or art. XIII, § 3. Lenstrom v. Thone 783

Commission of Industrial Relations.

1. The Commission of Industrial Relations, as an administrative body, has no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the plain purpose of the act. IBEW Local 763 v. Omaha P.P. Dist. 335
2. Under the provisions of Neb. Rev. Stat. § 48-819 (Cum. Supp. 1980), the Commission of Industrial Relations has no authority to enforce its own orders, such orders only being enforceable in an appropriate proceeding in courts of this state. IBEW Local 763 v. Omaha P.P. Dist. 335
3. An order of the Commission of Industrial Relations constitutes a contract between the parties, enforceable as any other contract entered into by the parties. IBEW Local 763 v. Omaha P.P. Dist. 335
4. An order of the Commission of Industrial Relations, once sued upon, may bear prejudgment interest, just as certain other contracts sued upon may bear prejudgment interest; however, such fact does not authorize the Commission of Industrial Relations to order the payment of interest as a part of its order. Such authority lies solely with an appropriate court and comes into effect only when entered by that appropriate court, in the same manner to which any other suit upon a contract would be subject to the payment of prejudgment interest if and when ordered by an appropriate court. IBEW Local 763 v. Omaha P.P. Dist. 335

Confessions.

1. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
   State v. Teater 127
   State v. Strickland 133
2. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Teater 127
3. The admissibility of statements obtained after the person in

custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored. State v. Strickland 133
4. The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Strickland ... 133
5. The standards to determine the admissibility of statements made after an illegal arrest are: (1) The administration of the *Miranda* warnings prior to the statement; (2) The temporal proximity of the arrest and the confession; (3) The intervening circumstances between the initial detention and the challenged statements; (4) The purpose and flagrancy of the official misconduct; and (5) The voluntariness of the statement must be established. State v. Smith 505
6. Where there is one confession by a defendant properly admitted into evidence and there was strong corroborative evidence of the guilt of the defendant, the admission of another confession, even though it should have been excluded, is harmless error. State v. Smith 505
7. A statement by an interrogating officer that, if the person being questioned would give a statement to the officer, the officer would advise the county attorney that the person being questioned had cooperated by giving a statement is not such an inducement as to render a statement given under such circumstances involuntary and, therefore, subject to being suppressed. State v. Muenchau and Brown 552

Consideration.

1. A preexisting debt is a valuable and sufficient consideration for a mortgage given to secure that debt. O'Neill Production Credit Assn. v. Mitchell 206
2. A real estate mortgage given to secure the preexisting debt of another is supported by valuable and sufficient consideration. O'Neill Production Credit Assn. v. Mitchell 206
3. While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327

Constitutional Law.

1. Neb. Rev. Stat. § 43-209 (Reissue 1978) is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness. In re Interest of J.L.L. 76
2. The sixth amendment right to assistance of counsel at a

police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information. State v. Smith 86
3. A preindictment or preinformation lineup may be challenged on due process grounds if the lineup is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Smith 86
4. When the Legislature chooses to inaugurate reforms in the area of economics or social welfare, it is not required to make the choice between attacking every aspect of a problem or not attacking the problem at all, as long as the action has a rational basis and is free from invidious discrimination. Otto v. Hahn 114
5. The one attacking the exemption of farm laborers from the provisions of the Workmen's Compensation Act as a violation of equal protection has the burden of proving that there is no rational basis for the classification. Otto v. Hahn 114
6. For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. Sharski 122
7. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. Courts will not pass upon a question of constitutionality unless it becomes necessary to do so. State v. Austin 174
8. So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file, generally rests entirely in his discretion. Within the limits set by the Legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. White 218
9. Article III, § 2, of the Constitution of the United States, which grants original jurisdiction to the Supreme Court of the United States in cases in which a state may be a party, is neither a mandatory nor an exclusive grant of jurisdiction so as to deprive the state courts of jurisdiction in cases involving a state and one of its citizens. State v. Jones 296
10. The rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. The constitutional inhibition is directed to the identity of the offense and not to the act. State v. Stabler 298
11. The Legislature may provide for the trial of petty offenses in

violation of a city or village ordinance without a jury when Article I, § 6, of the Constitution of Nebraska is not violated. State v. Flores 302
12. A defendant who is charged with the violation of a city ordinance, with a maximum authorized penalty of 6 months' incarceration, is not entitled to a jury trial under the U.S. Constitution. State v. Flores 302
13. The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search. State v. Watts 371
14. The capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. State v. Cemper 376
15. A person has no legitimate expectation of privacy in an open field in which he has no personal ownership or possessory rights, and cannot claim the protection of the fourth amendment as to unreasonable searches and seizures. State v. Cemper 376
16. Conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional. State v. Lingle 492
17. Neb. Rev. Stat. §§ 86-701 to 86-712 (Reissue 1976) provide their own exclusionary rule which exists separate and independent of any court-created exclusionary rule involving the fourth amendment. State v. Aulrich 546
18. The provisions of Neb. Rev. Stat. § 29-411 (Reissue 1979), providing for entry for search pursuant to warrant "without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of . . . if such notice be given," do not offend the fourth amendment prohibition against unreasonable search and seizure. State v. Meyer 757
19. The Scholarship Award Program, provided by Neb. Rev. Stat. §§ 85-980 to 85-9,102 (Cum. Supp. 1980), does not violate Neb. Const. art. VII, § 11, or art. XIII, § 3. Lenstrom v. Thone 783
20. The Legislature has plenary legislative authority limited only by the state and federal Constitutions. Lenstrom v.

Thone 783
21. The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution. Lenstrom v. Thone 783
22. The Nebraska Constitution is not a grant but a restriction of legislative power. Consequently, courts can enforce only those limitations which the Constitution imposes. Lenstrom v. Thone 783
23. Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. Lenstrom v. Thone 783
24. Implied restrictions on the legislative power are not to be inferred unless the restriction is one that is clearly implied. Lenstrom v. Thone 783
25. Legislation which serves a public purpose is not constitutionally impermissible because incidental benefits may accrue to others. Lenstrom v. Thone 783
26. A duly enacted statute is presumed constitutional and may not be invalidated by the court unless clearly in contravention of a provision of fundamental law or of public policy. Lenstrom v. Thone 783

Constitutional Rights.

A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights. State v. Tweedy 649

Contempt.

1. The disobedience of an injunction must be willful before a breach of it may be punished as a contempt. Sprunk v. Ditter 156
2. If there is a question as to what a court intends by its order, a party who acts on his own interpretation does so at his peril. Sprunk v. Ditter 156
3. An award of damages is improper in a contempt proceeding.

Sprunk v. Ditter 156
4. One cannot be held in contempt of court for acts which became prohibited by a court order entered subsequent to their commission. Grady v. Grady 311
5. An action to enforce a court order is normally a mere civil contempt and requires the appropriate standard of proof applicable thereto. Grady v. Grady 311

Contracts.
1. The nature of a contract as an option or obligation to purchase is to be determined not by the name which the parties have given it but by the nature of the obligation which it imposes. DaLee Realty, Inc. v. Kuhl 6
2. Where a contract is on a regular printed form prepared by one party, an ambiguous provision in the printed portion should be construed most strictly against such party. DaLee Realty, Inc. v. Kuhl 6
3. Where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects. Moss v. Speck 46
4. Where the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. Moss v. Speck 46
5. Absent contrary statutory provisions, manufacturers are free to enter into franchise agreements for the distribution of their products as they see fit. McDonald's Corp. v. Markim, Inc. 49
6. Generally, any person may do business with whomsoever he desires. Also, he may refuse business relations with any person whomsoever, whether the refusal is based on reason, whim, or prejudice. McDonald's Corp. v. Markim, Inc. .. 49
7. A contract which provides that an existing franchise holder must be given first consideration for an extension or renewal of the term does not mean that such franchisee must be given thoughtful or sympathetic regard in preference to anyone else, but only that the franchisee's qualifications be examined first and that a decision by the franchisor regarding the granting or denying of such extension must be actually and honestly exercised. Such decision must be made with entire good faith and not captiously or capriciously. McDonald's Corp. v. Markim, Inc. 49
8. As a general rule, the covenants of a contract will be considered and held as dependent conditions to be performed by the respective parties unless it is clear that the parties intended them to be independent. Gaspar v. Flott 260

9. While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
10. In order for an agreement to be voidable by reason of economic duress, it must not only have been obtained be means of pressure brought to bear, but the resulting agreement must be unjust, unconscionable, or illegal. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
11. A party cannot maintain an action on a contract without a prior substantial compliance on its part. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
12. A right to recover on a contract does not obtain when the party seeking to recover has performed its obligations in a negligent manner. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
13. A party to whom performance is owed should receive at least approximately what it bargained for. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
14. "Substantial performance" is a relative term and whether it exists or not is a question to be determined in each case with reference to the existing facts and circumstances. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
15. An order of the Commission of Industrial Relations constitutes a contract between the parties, enforceable as any other contract entered into by the parties. IBEW Local 763 v. Omaha P.P. Dist. 335
16. If a contract contemplates that an agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency. Oehlrich v. Gateway Realty of Columbus, Inc. 417
17. When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such contract is a question of law. Oehlrich v. Gateway Realty of Columbus, Inc. 417
18. By failing to make demand, a party to a contract to whom payment is due on demand cannot do away with the statute of limitations. Stock v. Meissner 636
19. Performance of an oral contract for the sale of goods that is capable of apportionment is enforceable only as to that portion that has been either fully or partially performed. In re Estate of Nelsen 730
20. A delivery alone by the seller is insufficient to take an oral contract for the sale of goods of the price of $500 or more out of the statute of frauds. The goods must have been re-

ceived and accepted before avoidance of the statute of frauds is recognized. In re Estate of Nelsen 730
21. The interpretation given a contract by the parties themselves while engaged in the peformance of it is one of the best indications of the true intent of their contract, and should be given great, if not controlling, influence. Strayer v. City of Omaha 734

Convictions.

1. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Rolling 243
2. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Rolling 243
3. No defendant, once convicted, is entitled to be placed on probation as a matter of law. State v. Johnson 308

Costs.

1. Either the county court or the District Court on appeal ordinarily has discretionary power and authority to order payment of costs and, in proper cases, to order payment of reasonable fees to attorneys for services rendered to a good faith trustee out of the trust estate in litigation. In re Guardianship of Bremer 267
2. The award of attorney fees and the taxing of costs is discretionary with the District Court. Kocarnik v. Kocarnik 454
3. Where the loan receipt under which the insurer advances money to an insured obligates the insurer to bear the expense of all legal proceedings pursued in prosecuting the claims of the insured which the insured has pledged to the insurance company, it is improper to charge the insured with any of the expense of litigation. Hammond v. Nebraska Nat. Gas Co. 616

Courts.

1. Article III, § 2, of the Constitution of the United States, which grants original jurisdiction to the Supreme Court of the United States in cases in which a state may be a party, is neither a mandatory nor an exclusive grant of jurisdiction so as to deprive the state courts of jurisdiction in cases involving a state and one of its citizens. State v. Jones 296

2. The trial court has no jurisdiction to enter an order after the defendant has perfected his appeal to the Supreme Court. Beavers v. Graham 556

Criminal Attempt.

In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. State v. Sharski 122

Criminal Defendants.

A defendant who is released following imposition of sentence to reappear upon further order of the court has been "released from custody under . . . a conditioned release" within the meaning of Neb. Rev. Stat. § 29-908 (Reissue 1979). State v. Robinson 726

Criminal Law.

1. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
   State v. Teater 127
   State v. Strickland 133
2. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Teater 127
3. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. White 218
4. So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file, generally rests entirely in his discretion. Within the limits set by the Legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. White 218

5. Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant. State v. Resler 249
6. The basic elements of the emergency doctrine exception may be summarized in the following manner: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) The search must not be primarily motivated by intent to arrest and seize evidence; and (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. State v. Resler 249
7. In determining whether two charges constitute the same offense, the test to be applied is whether each charge requires proof of different facts or evidence. State v. Stabler 298
8. A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act. State v. Stabler 298
9. The rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. The constitutional inhibition is directed to the identity of the offense and not to the act. State v. Stabler 298
10. A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Stabler 298
11. When sentencing a criminal defendant to a term of imprisonment under the indeterminate sentencing statute, the minimum limit of the sentence fixed by the court shall not be less than the minimum provided by law nor more than one-third the maximum term. Neb. Rev. Stat. § 83-1,105 (Reissue 1976). State v. Thomas 304
12. In the absence of a motion for new trial in a criminal case, the only issues remaining for argument are whether the

pleadings support the judgment and whether the judgment is excessive. State v. Ditter 452
13. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admissible if elicited from him or established by public record during cross-examination, but only if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, or involved dishonesty or false statement. State v. Lingle 492
14. The District Court after arrest may consider time spent in a medical institution pursuant to a valid mental health commitment in determining credit for time to be applied against the sentence. State v. Prosser 766
15. It was not an abuse of discretion for the trial court to fail to give credit for time spent in a mental institution where the sentence pronounced was not the statutory maximum for the offense. State v. Prosser 766
16. A prior criminal proceeding can work a collateral estoppel in a subsequent civil proceeding, if the question involved is distinctly put in issue and directly determined in the criminal action. Fowler v. Nat. Bank of Commerce 861
17. Generally, it is within the discretion of the trial court whether evidence of other crimes is admissible. State v. Dandridge 885
18. It is also within the discretion of the trial court whether other offenses are sufficiently similar to the one charged so that evidence of the other offenses has probative value. State v. Dandridge 885
19. In determining whether evidence of other crimes is admissible, important considerations are remoteness in point of time and unique, almost "signature-like" similarity between the charged crime and the other crimes. State v. Dandridge 885
20. In determining whether the suppression of evidence was prejudicial to an accused, it must be evaluated in the context of the entire record. State v. Dandridge 885

Criminal Trials.

1. An in-court identification based on the witness' observations at the time of the alleged crime is admissible. State v. Jackson 486
2. The criteria for determining whether identification testimony will be admissible after a suggestive lineup are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. State v. Jackson 486

3. A trial court is not required to make written conclusions of fact and conclusions of law in a criminal trial. State v. Lozano 772
4. Where one maintains that counsel was inadequate, one must likewise show how or in what manner that alleged inadequacy prejudiced one. State v. Holloman 828

Damages.

1. Where water from another source has been added to the water for which a defendant is liable and the combined water causes damage, it is incumbent upon the plaintiff to establish either that his entire damages would have occurred from the waters for which the defendant is liable, or to establish the amount of the damage caused by the water for which the defendant is liable. Schmidt v. Chimney Rock Irrigation Dist. 1
2. Where there has been misrepresentation in the sale of real estate, the measure of damages is the difference between the value of the property conveyed and the value of the property if it had been as represented. Bibow v. Gerrard 10
3. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as warranted. Settell's, Inc. v. Pitney Bowes, Inc. 26
4. Damages must be pled and proved, and the failure to offer proof on the issue of the value of goods as accepted will foreclose the method of determining damages from the court's consideration. Settell's, Inc. v. Pitney Bowes, Inc. 26
5. The trial court must refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine the issue without indulging in speculation and conjecture. Settell's, Inc. v. Pitney Bowes, Inc. 26
6. Where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects. Moss v. Speck 46
7. Where the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. Moss v. Speck 46
8. An award of damages is improper in a contempt proceeding. Sprunk v. Ditter 156
9. It is a fundamental principle of the law of damages that a person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of medical care and expense incurred for the treatment of the

injuries to the time of trial, as well as the cost of those reasonably certain to be incurred in the future. Stanek v. Swierczek 357
10. The cost of a general health policy may not be substituted for proof of past and future medical expenses. Stanek v. Swierczek 357

Deceptive Trade Practices.
1. Comparative advertising which is untrue, misleading, or deceptive is unlawful. Kirsch Fabric Corp. v. Brookstein Enterprises, Inc. 666
2. Deceptive trade practices and unfair competition may be enjoined under Nebraska law. Kirsch Fabric Corp. v. Brookstein Enterprises, Inc. 666

Deeds.
Upon delivery and acceptance of an unambiguous deed, all prior negotiations and agreements are deemed merged therein. Bibow v. Gerrard 10

Demurrer.
Leave to amend a petition should ordinarily be granted after a demurrer is sustained. However, when it is clear that no reasonable possibility exists that plaintiff will, by amendment, be able to state a cause of action, leave to amend may be denied. Fowler v. Nat. Bank of Commerce 861

Directed Verdict.
1. A motion for a directed verdict should be sustained only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion.
   Settell's, Inc. v. Pitney Bowes, Inc. 26
   Stephen v. City of Lincoln 792
   Camerlinck v. Thomas 843
2. The party against whom a verdict is directed is entitled to have all controverted facts resolved in his favor and to have the benefit of every reasonable inference deducible from the evidence.
   Syas v. Nebraska Methodist Hospital Foundation 201
   Stephen v. City of Lincoln 792
   Camerlinck v. Thomas 843

Divorce.
1. Dissolution of marriage actions are tried de novo on the record; however, this court, in reaching its decision, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Kullbom v. Kullbom . 145

2. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together, the marriage is irretrievably broken. Johnson v. Johnson 317
3. The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. Johnson v. Johnson 317
4. Generally speaking, awards in cases of this kind vary from one-third to one-half the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so where the marriage is of long duration and the parties are the parents of the children involved. Johnson v. Johnson 317
5. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. Johnson v. Johnson 317
6. There is no rule which requires a trial court to necessarily award attorney fees in accordance with the value of the services in a divorce case. The award of attorney fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Johnson v. Johnson 317

Double Jeopardy.

The rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. The constitutional inhibition is directed to the identity of the offense and not to the act. State v. Stabler 298

Effectiveness of Counsel.

1. Where one maintains that counsel was inadequate, one must likewise show how or in what manner that alleged inadequacy prejudiced one. State v. Holloman 828
2. In post conviction relief cases the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. State v. Holloman 828

Emancipation.

1. The emancipation of a child by a parent may be proved by circumstantial evidence or by an express agreement, or implied from the conduct of the parties. Accent Service Co., Inc. v. Ebsen 94

2. Where a minor departs from the family home with parental consent, takes his personal belongings with him, thereafter furnishes his own support and receives nothing from his parent, that minor becomes emancipated, thereby relieving the parent from liability to those who furnish necessaries of life to the minor. Accent Service Co., Inc. v. Ebsen .. 94

Emergency Vehicles.

1. The driver of an emergency vehicle has a duty not to drive in reckless disregard for the safety of others. Lee v. City of Omaha 345
2. The provisions of Neb. Rev. Stat. § 39-608 (Reissue 1978) shall not relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect such driver from the consequences of his reckless disregard for the safety of others. Lee v. City of Omaha 345
3. A police officer pursuing a traffic violator is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances. Lee v. City of Omaha 345

Employment Security Law.

1. Under the Nebraska Employment Security Law a week of unemployment with respect to any individual shall mean any week during which he performs less than full-time work and the wages payable to him with respect to such week are less than his weekly benefit amount. Hanlon v. Boden 169
2. The disqualification of employees of educational institutions and professional athletes for unemployment benefits under Neb. Rev. Stat. § 48-628(h) and (i) (Reissue 1978) does not include professional symphony musicians. Hanlon v. Boden 169
3. The beneficent provisions of an unemployment compensation act should receive a liberal construction in favor of those claiming benefits under it. Hanlon v. Boden 169

Equity.

1. In an action in equity, it is the duty of the Supreme Court to try the issue de novo upon the record and to reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case.

   Schmidt v. Chimney Rock Irrigation Dist. 1

McDonald's Corp. v. Markim, Inc. 49
O'Neill Production Credit Assn. v. Mitchell 206
Knoell Constr. Co., Inc. v. Hanson 461
Sturm v. Mau 865

2. Although mortgage clauses which undertake to secure subsequent debts are not favored in equity and are carefully scrutinized and strictly construed, they will, in the absence of other legal prohibition, be enforced to the extent they are determined to have been within the intent of the parties. O'Neill Production Credit Assn. v. Mitchell 206
3. Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required, and thus avoid unnecessary litigation. Ogle v. Lincoln Real Estate, Inc. 704
4. The prayer of a pleading tenders no issue, and neither adds to nor takes from the evidence required of either party. The prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence. Sullivan v. General United Life Ins. Co. 872

Estates.

1. If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate. In re Guardianship of Bremer 267
2. Either the county court or the District Court on appeal ordinarily has discretionary power and authority to order payment of costs and, in proper cases, to order payment of reasonable fees to attorneys for services rendered to a good faith trustee out of the trust estate in litigation. In re Guardianship of Bremer 267
3. One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty. In re Estate of Schoch 812
4. Testamentary capacity is tested by the state of a testator's mind at the time he executes his will. In re Estate of Schoch 812
5. Although competent evidence of a testator's condition of mind long before, closely approaching, and shortly after the execution of a will is admissible, it is received only to assist in revealing his state of mind at the time the will was executed. In re Estate of Schoch 812

6. It is the duty of the proponent of a will, in the first instance, to make a prima facie case as to testamentary capacity; it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. In re Estate of Schoch 812

Estoppel.

Where the statutory requirements of signature and acknowledgment by both husband and wife to encumbrance of a homestead are wanting, they cannot be supplied by estoppel. An interest in the homestead simply will not pass nor be created unless the documents for that purpose are signed and acknowledged by both husband and wife. O'Neill Production Credit Assn. v. Mitchell 206

Evidence.

1. It is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
   State v. Farr 163
   Trout v. Olson Bros. Mfg. Co. 477
2. Where there is a total lack of evidence to establish that defendant dumped or deposited refuse upon his property on the dates alleged in the complaints, in violation of Lincoln Municipal Code § 8.28.020, defendant's convictions and sentences must be vacated and set aside. State v. Austin 174
3. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. White 218
4. In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it.
   Osteen v. A.C. and S., Inc. 282
   Lee v. City of Omaha 345
5. In determining whether two charges constitute the same offense, the test to be applied is whether each charge requires proof of different facts or evidence. State v. Stabler 298

6. If an answer properly pleads a defense, it is error to prohibit a defendant from offering evidence in support thereof. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
7. Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Mack v. Dale Electronics, Inc. 367
8. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. Mack v. Dale Electronics, Inc. 367
9. It is within the discretion of the District Court to take testimony orally for the determination of issues of fact arising upon motions, and not a right of either party to compel the adduction of such testimony. Doyle v. Union Ins. Co. 385
10. In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant, and material and with relation to a material issue, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted. Kocarnik v. Kocarnik 454
11. The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment. Riha v. St. Mary's Church & School, Inc. 539
12. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. Riha v. St. Mary's Church & School, Inc. 539
13. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony. Riha v. St. Mary's Church & School, Inc. 539
14. In an action for wrongful death, the plaintiff may establish by a preponderance of the evidence that the wrongful act or omission of the defendant was the proximate cause of death and such connection may be shown by circumstantial

evidence. Beebe v. Sorensen Sand & Gravel Co. 559
15. The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury. Burrows v. Jacobsen 778
16. The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion. Stephen v. City of Lincoln 792
17. Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury. Stephen v. City of Lincoln 792
18. It is the duty of the trial court to submit to the jury all material issues presented by the pleadings which find support in the evidence adduced. Stephen v. City of Lincoln 792
19. A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. Crawford v. Ham 802
20. A trial court has broad discretion to exclude cumulative evidence. In re Estate of Schoch 812
21. Generally, it is within the discretion of the trial court whether evidence of other crimes is admissible. State v. Dandridge 885
22. It is also within the discretion of the trial court whether other offenses are sufficiently similar to the one charged so that evidence of the other offenses has probative value. State v. Dandridge 885
23. In determining whether evidence of other crimes is admissible, important considerations are remoteness in point of time and unique, almost "signature-like" similarity between the charged crime and the other crimes. State v. Dandridge 885
24. In determining whether the suppression of evidence was prejudicial to an accused, it must be evaluated in the context of the entire record. State v. Dandridge 885
25. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. State v. Dandridge 885

Expert Witnesses.

1. Although it is frequently stated that medical testimony must be given with "reasonable medical certainty," it is sufficient when such testimony is stated in terms of "probability." In this connection, "reasonable certainty" and "reasonable probability" are one and the same thing. Lane v. State Farm Mut. Automobile Ins. Co. 396
2. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Neb. Rev. Stat. § 27-702 (Reissue 1979).
   Lane v. State Farm Mut. Automobile Ins. Co. 396
   State v. Loveless 583
3. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Neb. Rev. Stat. § 27-703 (Reissue 1979). Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
4. The value of an opinion of an expert is no stronger than the facts upon which it is based. Riha v. St. Mary's Church & School, Inc. 539

Extradition.

Requiring the execution of a waiver of extradition as a condition precedent to probation does not render the waiver involuntary without a specific showing of how such a condition was coercive as applied in the particular case. State v. Lingle 492

Fees.

If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate. In re Guardianship of Bremer 267

Final Orders.

1. An order overruling a special appearance is not a final order from which an appeal can be taken. State v. Jones 296
2. In the absence of a final order which disposes of a case, this court has neither authority nor jurisdiction to act on an attempted appeal and the same will be dismissed. State v. Jones 296

Fraud.

1. Where there has been misrepresentation in the sale of real estate, the measure of damages is the difference between the value of the property conveyed and the value of the property if it had been as represented. Bibow v. Gerrard 10
2. Where ordinary prudence would have prevented the deception, an action for the fraud perpetuated by such deception will not lie. Bibow v. Gerrard 10

Guardians Ad Litem.

A guardian ad litem may not waive the substantive rights of the ward, but must require proper legal proof. In re Interest of Burbanks and Rima 676

Guardian and Conservators.

1. An order of a county court approving a final settlement of the accounts of a guardian or conservator, made or entered at a formal hearing of which all interested parties had notice, is a judgment which becomes res judicata and can only be vacated on such proof of fraud as would justify the setting aside of any other judgment. In re Guardianship of Bremer 267
2. If the object of a petition is to set aside an order approving a final account between a guardian or a conservator and his ward for fraud, it must allege some distinct and specific act of fraud from which the petitioner suffered injury. It is also necessary that such petitioner negative all fault or negligence on his part. In re Guardianship of Bremer 267

Hearsay.

Under the residual hearsay exception found in Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1979), the proponent of the evidence has the burden of establishing each of the conditions of admissibility imposed by the rule. In re Estate of Schoch . 812

Highways.

1. One causing an obstruction on the highway must use ordinary care to prevent injury to others using the highway. Brown v. Nebraska P.P. Dist. 61
   Drawbridge and Misterek v. Douglas County 806
2. An obstruction includes anything which will interfere with the public's use of the highway easement, and includes inanimate objects or substances which are just as dangerous and obstructive as solid obstructions. Brown v. Nebraska P.P. Dist. 61
3. Unless specifically made applicable, the provisions of Neb. Rev. Stat. §§ 39-601 to 39-6,122 (Reissue 1978), except those provisions relative to careless driving and to reckless driving, shall not apply to: (1) Persons, teams of draft animals,

motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work. Neb. Rev. Stat. § 39-606 (Reissue 1978). Beebe v. Sorensen Sand & Gravel Co. 559

4. Whether or not a person is "actually engaged in work upon the surface of a highway" at the time of an alleged occurrence, so as to come under the provisions of Neb. Rev. Stat. § 39-606 (Reissue 1978), may be a question of fact, depending on the circumstances. Beebe v. Sorensen Sand & Gravel Co. 559
5. A failure to so warn the traveling public is continuing negligence as distinguished from a condition. Drawbridge and Misterek v. Douglas County 806
6. To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land. Sturm v. Mau 865
7. It is not indispensable to the establishment of a highway by prescription that there be no deviation in the line of travel; if the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like, there have been slight changes in the line of travel. Sturm v. Mau ... 865
8. A diminution in the number of users does not constitute an abandonment of a road acquired by prescription. Sturm v. Mau 865

Homesteads.

Where the statutory requirements of signature and acknowledgment by both husband and wife to encumbrance of a homestead are wanting, they cannot be supplied by estoppel. An interest in the homestead simply will not pass nor be created unless the documents for that purpose are signed and acknowledged by both husband and wife. O'Neill Production Credit Assn. v. Mitchell 206

Homicide.

A sentence to life imprisonment for second degree murder is effective as an indeterminate sentence of 10 years to life. State v. Moore 88

Identification Procedures.

1. The sixth amendment right to assistance of counsel at a police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information. State v.

Smith 86
2. A preindictment or preinformation lineup may be challenged on due process grounds if the lineup is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Smith 86
3. An in-court identification based on the witness' observations at the time of the alleged crime is admissible. State v. Jackson 486
4. The criteria for determining whether identification testimony will be admissible after a suggestive lineup are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. State v. Jackson 486

Indian Child Welfare Act.
1. Continued hearings in a proceeding are not subsequent proceedings within the meaning of the Indian Child Welfare Act. 25 U.S.C.A. § 1923 (Supp. 1963 to 1980). In re Interest of Bird Head 575
2. A child custody proceeding includes "any action which results in the termination of the parent-child relationship." 25 U.S.C.A. § 1903 (Supp. 1963 to 1980). In re Interest of Bird Head 575

Indictments and Informations.
1. The sixth amendment right to assistance of counsel at a police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information. State v. Smith 86
2. A preindictment or preinformation lineup may be challenged on due process grounds if the lineup is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Smith 86
3. In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. State v. Sharski 122
4. An information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
   State v. Lingle 492
   State v. Coleman 823

5. A complaint charging a statutory misdemeanor substantially in the language of the statute will be liberally rather than technically construed, and if a defect is amendable, it will be held sufficient on appeal in the absence of objection in the trial court. State v. Lingle 492
6. An information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for this same offense. State v. Lingle 492
7. A complaint or information is fatally defective only if its allegations can be true and still not charge a crime. State v. Coleman 823
8. The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue. State v. Coleman 823

Injunction.

1. Injunctive relief is preventive, protective, and prohibitory; it will not issue to afford a remedy for what is past but only to prevent future mischief. Rights already lost and wrongs already perpetrated cannot be restrained or remedied by injunction. Schmidt v. Chimney Rock Irrigation Dist. ... 1
2. The disobedience of an injunction must be willful before a breach of it may be punished as a contempt. Sprunk v. Ditter 156
3. Deceptive trade practices and unfair competition may be enjoined under Nebraska law. Kirsch Fabric Corp. v. Brookstein Enterprises, Inc. 666

Insurance.

1. The cost of a general health policy may not be substituted for proof of past and future medical expenses. Stanek v. Swierczek 357
2. It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued. Manzer v. Pentico 364
3. Neb. Rev. Stat. § 60-509.01 (Reissue 1978), providing for uninsured motorist coverage, was enacted for the benefit of the innocent victim of a financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose. Lane v. State Farm Mut. Automobile Ins. Co. .. 396
4. It is not a prerequisite to recovery under an uninsured motorist policy provision that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the automobile liability insurer. Lane v. State Farm Mut. Automobile Ins. Co. 396

5. An arrangement between an insurer and an insured, whereby the former loans to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement, and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest. Hammond v. Nebraska Nat. Gas Co. 616
6. Where the loan receipt under which the insurer advances money to an insured obligates the insurer to bear the expense of all legal proceedings pursued in prosecuting the claims of the insured which the insured has pledged to the insurance company, it is improper to charge the insured with any of the expenses of litigation. Hammond v. Nebraska Nat. Gas Co. 616
7. An insurer which recovers, on behalf of its insured in a negligence action brought against a third person, the amount which the insurer has paid the insured is entitled to the judgment interest awarded on that amount, even though the loan receipt under which the insurer advanced funds to the insured provides that the loan is without interest, as such interest is not paid directly or indirectly by the insured but is paid by the third party with whom the insured has ceased to have concern and privity. Hammond v. Nebraska Nat. Gas Co. 616

Interest.

1. The trial court has the inherent power, in adjusting the rights of the parties, to provide that a money allowance to be paid in installments shall not draw interest until a certain date. Johnson v. Johnson 317
2. An insurer which recovers, on behalf of its insured in a negligence action brought against a third person, the amount which the insurer has paid the insured is entitled to the judgment interest awarded on that amount, even though the loan receipt under which the insurer advanced funds to the insured provides that the loan is without interest, as such interest is not paid directly or indirectly by the insured but is paid by the third party with whom the insured has ceased to have concern and privity. Hammond v. Nebraska Nat. Gas Co. 616

Investigative Stops.

1. A police officer may in appropriate circumstances and in a proper manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Ebberson .. 41
2. The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal

activity has occurred or is occurring and that the suspect may be involved. State v. Ebberson 41
3. An investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account. State v. Ebberson 41
4. Police officers may stop any person in a public place whom they reasonably suspect of committing, who has committed, or who is about to commit a crime, and may demand of that person his name, address, and an explanation of his actions. State v. Nowicki 640
5. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior. State v. Nowicki 640

Invitor-Invitee.

1. A possessor of land is not an insurer of the safety of business invitees on its land. Syas v. Nebraska Methodist Hospital Foundation 201
2. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (3) fails to exercise reasonable care to protect them against the danger. Syas v. Nebraska Methodist Hospital Foundation 201

Judgments.

1. The judgment of the trial court in a law action where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong.
   Moss v. Speck 46
   Crawford v. Ham 802
   B Town, Inc. v. Albright 819
2. Where there is a total lack of evidence to establish that defendant dumped or deposited refuse upon his property on the dates alleged in the complaints, in violation of Lincoln Municipal Code § 8.28.020, defendant's convictions

and sentences must be vacated and set aside. State v. Austin 174

3. A decree awarding custody of a minor child and fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the child. Helgenberger v. Helgenberger 184
4. An order of a county court approving a final settlement of the accounts of a guardian or conservator, made or entered at a formal hearing of which all interested parties had notice, is a judgment which becomes res judicata and can only be vacated on such proof of fraud as would justify the setting aside of any other judgment. In re Guardianship of Bremer 267
5. Where the record affirmatively shows that the only ruling complained of is clearly right and plainly in accordance with law, an appeal will be dismissed as frivolous. State v. Jones 296
6. In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party, every controverted fact must be resolved in his or her favor, and he or she is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
   Lee v. City of Omaha 345
   Crawford v. Ham 802
   In re Estate of Schoch 812
   B Town, Inc. v. Albright 819
7. A judgment denying probation and imposing a sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion. State v. Rosenberry 383
8. It is not a prerequisite to recovery under an uninsured motorist policy provision that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the automobile liability insurer. Lane v. State Farm Mut. Automobile Ins. Co. 396
9. If there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary and capricious. In re Application of Greyhound Lines, Inc. 430
10. The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a security interest under the Uniform Commercial Code given to secure its payment. Ceres Fertilizer, Inc. v.

Beekman 447
11. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
12. A judgment which is unduly broad and makes prospective findings is erroneous. Kirsch Fabric Corp. v. Brookstein Enterprises, Inc. 666
13. In reviewing an appeal from the decision of a trial court in a law action, the review is not de novo. The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence.
Crawford v. Ham 802
In re Estate of Schoch 812

Judicial Notice.
1. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
Sherwood v. Brown 68
Fowler v. Nat. Bank of Commerce 861
2. A court may take judicial notice of the fact that substances such as cocaine, LSD, and certain forms of prepared marijuana may be easily and quickly disposed of by flushing down a toilet or drain. State v. Meyer 757

Juries.
1. The reasonableness of the force used in effecting an arrest is a question for the jury. State v. Lingle 492
2. Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury. Stephen v. City of Lincoln 792
3. It is the duty of the trial court to submit to the jury all material issues presented by the pleadings which find support in the evidence adduced. Stephen v. City of Lincoln 792

Jurisdiction.
1. Article III, § 2, of the Constitution of the United States, which grants original jurisdiction to the Supreme Court of the United States in cases in which a state may be a party, is neither a mandatory nor an exclusive grant of jurisdiction so as to deprive the state courts of jurisdiction in cases involving a state and one of its citizens. State v. Jones .. 296
2. The Commission of Industrial Relations, as an administra-

tive body, has no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the plain purpose of the act. IBEW Local 763 v. Omaha P.P. Dist. 335
3. Under the provisions of Neb. Rev. Stat. § 48-819 (Cum. Supp. 1980), the Commission of Industrial Relations has no authority to enforce its own orders, such orders only being enforceable in an appropriate proceeding in courts of this state. IBEW Local 763 v. Omaha P.P. Dist. 335
4. Filing of a notice of appeal in this court vests exclusive jurisdiction in this court.
State v. Ditter 452
Beavers v. Graham 556
5. Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required, and thus avoid unnecessary litigation. Ogle v. Lincoln Real Estate, Inc. 704

Jury Instructions.
1. Jury instruction that a landlord may, in the absence of unusual circumstances, if any it finds, without violating its duty to exercise reasonable care for the safety of a tenant or a tenant's visitors, await the end of a snowstorm and a reasonable time thereafter before removing ice and/or snow from outside entrances, walks, platforms, or steps, *disapproved.* Danner v. Myott Park, Ltd. 103
2. A jury instruction which misstates issues or defenses and has a tendency to confuse the jury is erroneous. Danner v. Myott Park, Ltd. 103
3. When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given. Lane v. State Farm Mut. Automobile Ins. Co. 396
4. Instructions must be taken as a whole and construed together, and where the instructions covered the issues and fairly submitted the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous. Lane v. State Farm Mut. Automobile Ins. Co. 396
5. When complaint is made of the refusal of the District Court to give an instruction asked, the burden is upon the party complaining to show not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case. State v. Lingle 492
6. A party may not tender an instruction to the court and

then, after an adverse verdict, object to its submission to the jury. Wooley v. Kittle 669
7. Failure to object to instructions after they are submitted to counsel for review precludes raising objections to said instructions on appeal. Wooley v. Kittle 669
8. The fact that an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction. State v. Dandridge 885

Jury Trials.

1. The Legislature may provide for the trial of petty offenses in violation of a city or village ordinance without a jury when Article I, § 6, of the Constitution of Nebraska is not violated. State v. Flores 302
2. A defendant who is charged with the violation of a city ordinance, with a maximum authorized penalty of 6 months' incarceration, is not entitled to a jury trial under the U.S. Constitution. State v. Flores 302
3. What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine. Beebe v. Sorensen Sand & Gravel Co. 559

Jury Verdicts.

1. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Trout v. Olson Bros. Mfg. Co. 477
2. After a verdict by a jury a motion for new trial must be made within 10 days after the verdict was rendered and accepted by the court, not from the date judgment was entered on the verdict. Novak v. Nelsen 728

Juvenile Courts.

1. Neb. Rev. Stat. § 43-209 (Reissue 1978) sets out six independent conditions, any one of which existing alone will justify termination of parental rights. In re Interest of Wood and Linden 18
2. There is no requirement that the court must implement a rehabilitation program for the parent of a child found to be dependent and neglected. In re Interest of Wood and

Linden 18
3. Where the juvenile court has made a finding of neglect under Neb. Rev. Stat. § 43-209(2) (Reissue 1978), it need not afford the parent opportunity to correct the conditions underlying the finding before terminating parental rights. In re Interest of Wagner and Russell 33
4. An appeal of a juvenile case to this court is heard de novo upon the record; and the findings of fact by the trial court which heard and observed the witnesses and parties are accorded great weight and will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
In re Interest of J.L.L. 76
In re Interest of Kain 229
5. Neb. Rev. Stat. § 43-209 (Reissue 1978) is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness. In re Interest of J.L.L. 76
6. Continued hearings in a proceeding are not subsequent proceedings within the meaning of the Indian Child Welfare Act. 25 U.S.C.A. § 1923 (Supp. 1963 to 1980). In re Interest of Bird Head 575

Legislative Intent.
1. When interpreting legislative acts we are concerned with the intent of the Legislature in adopting the same. Otto v. Hahn 114
2. In determining that intent, we consider the history of the legislation and weigh a reasonable interpretation against an unreasonable or absurd construction. Otto v. Hahn ... 114
3. When the Legislature chooses to inaugurate reforms in the area of economics or social welfare, it is not required to make the choice between attacking every aspect of a problem or not attacking the problem at all, as long as the action has a rational basis and is free from invidious discrimination. Otto v. Hahn 114
4. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. State v. Farr 163
5. The legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances. State v. Farr 163

Legislative Power.
1. The Legislature has plenary legislative authority limited only by the state and federal Constitutions. Lenstrom v.

Thone 783
2. The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution. Lenstrom v. Thone 783
3. The Nebraska Constitution is not a grant but a restriction of legislative power. Consequently, courts can enforce only those limitations which the Constitution imposes. Lenstrom v. Thone 783
4. Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. Lenstrom v. Thone 783
5. Implied restrictions on the legislative power are not to be inferred unless the restriction is one that is clearly implied. Lenstrom v. Thone 783

Lesser-Included Offense.

1. A lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Resisting arrest is not a lesser-included offense of escape for, among other reasons, the crime of escape does not necessarily involve the use of force. State v. White 218
2. A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Stabler .. 298

Liability.

1. Where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the employer who most recently exposed the worker to the harmful substance is liable to pay the entire award. Osteen v. A.C. and S., Inc. .. 282
2. Where the employment at the time of disability was not of a kind contributing to the disease, the employer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation. Osteen v. A.C. and S., Inc. 282
3. An injurious exposure must be of the type which could

cause the disease, given prolonged exposure, and once the requirement of some contributing exposure has been met, courts will not go on to weigh the relative amount or duration of the exposure under various employers. Osteen v. A.C. and S., Inc. 282

Libel and Slander.

1. An action for slander must be brought within 1 year from the date the cause of action accrues. Lathrop v. McBride ... 351
2. An action for slander accrues at the time of publication. Lathrop v. McBride 351
3. A slander is published when the words are spoken and understood by a third person to pertain to the person slandered. Lathrop v. McBride 351
4. Ignorance of the publication or of the evidence probative of the plaintiff's claim does not postpone the operation of the statute of limitations. Lathrop v. McBride 351

Limitations of Actions.

1. Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee became disabled and entitled to compensation; and the date of injury, within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred and the period of limitations runs from that date. Osteen v. A.C. and S., Inc. 282
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5. Ignorance of the publication or of the evidence probative of the plaintiff's claim does not postpone the operation of the statute of limitations. Lathrop v. McBride 351
6. The statute of limitations begins to run when a cause of action accrues. Stock v. Meissner 636
7. By failing to make demand, a party to a contract to whom payment is due on demand cannot do away with the statute of limitations. Stock v. Meissner 636

Loans.

An arrangement between an insurer and an insured, whereby

the former loans to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement, and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest. Hammond v. Nebraska Nat. Gas Co. 616

Minors.

1. The emancipation of a child by a parent may be proved by circumstantial evidence or by an express agreement, or implied from the conduct of the parties. Accent Service Co., Inc. v. Ebsen 94
2. Where a minor departs from the family home with parental consent, takes his personal belongings with him, thereafter furnishes his own support and receives nothing from his parent, that minor becomes emancipated, thereby relieving the parent from liability to those who furnish necessaries of life to the minor. Accent Service Co., Inc. v. Ebsen 94
3. A parent may be held liable for necessaries of life furnished to an emancipated minor, where the parent orally or in writing agrees to the payment for such necessaries. Accent Service Co., Inc. v. Ebsen 94
4. If the actor is a child, the standard of care to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under the circumstances. Camerlinck v. Thomas 843
5. Where reasonable minds might draw different conclusions from the evidence, the question as to a child's negligence or contributory negligence under the circumstances is a matter for determination by the jury. Camerlinck v. Thomas 843

Miranda Rights.

1. Once *Miranda* warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.
   State v. Teater 127
   State v. Strickland 133
2. The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Strickland 133

Misdemeanors.

1. Where an individual is convicted of a misdemeanor and given an indeterminate sentence which is to be served in an institution under the jurisdiction of the Department of

Correctional Services, the provisions of Neb. Rev. Stat. § 83-1,105 (Reissue 1976) should apply. State v. Johnson ... 308
2. A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights. State v. Tweedy 649

Mortgages.

1. A preexisting debt is a valuable and sufficient consideration for a mortgage given to secure that debt. O'Neill Production Credit Assn. v. Mitchell 206
2. A real estate mortgage given to secure the preexisting debt of another is supported by valuable and sufficient consideration. O'Neill Production Credit Assn. v. Mitchell 206
3. Although mortgage clauses which undertake to secure subsequent debts are not favored in equity and are carefully scrutinized and strictly construed, they will, in the absence of other legal prohibition, be enforced to the extent they are determined to have been within the intent of the parties. O'Neill Production Credit Assn. v. Mitchell 206
4. A mortgage on real estate, other than as to the homestead, executed and delivered by the mortgagor is valid between the parties, even though it was not lawfully acknowledged. O'Neill Production Credit Assn. v. Mitchell 206

Motion to Vacate.

A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Nokes 293

Motions for New Trial.

1. In the absence of a motion for new trial in a criminal case, the only issues remaining for argument are whether the pleadings support the judgment and whether the judgment is excessive. State v. Ditter 452
2. A motion for new trial filed while the case is on appeal to this court is a nullity. State v. Ditter 452
3. In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant,

and material and with relation to a material issue, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted. Kocarnik v. Kocarnik 454

4. After a verdict by a jury a motion for new trial must be made within 10 days after the verdict was rendered and accepted by the court, not from the date judgment was entered on the verdict. Novak v. Nelsen 728
5. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the judgment or decree or the making of the final order. Novak v. Nelsen 728
6. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. State v. Dandridge 885

Motions to Dismiss.

A party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law. Beebe v. Sorensen Sand & Gravel Co. 559

Motor Carriers.

1. The burden is on the applicant for a certificate of public convenience and necessity to show he has met all the requirements of the statutes. In re Application of Greyhound Lines, Inc. 430
2. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest. In re Application of Greyhound Lines, Inc. 430
3. In considering a determination of the public convenience and necessity, the utility of a "closed door" policy and the value of a competitive market to the public must be considered. In re Application of Greyhound Lines, Inc. 430
4. The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to

stifle legitimate competition but to foster it. In re Application of Greyhound Lines, Inc. 430
5. Where commission approval of a transfer of authority is requested under Neb. Rev. Stat. § 75-318 (Reissue 1976), and an issue of dormancy is properly raised, the Nebraska Public Service Commission must determine both the fact of dormancy and, on the basis of the evidence, whether the public convenience and necessity require the transfer. Herman Bros., Inc. v. Spector Industries, Inc. 513
6. There are no mechanical rules for determining when rights have become dormant, and the test of substantiality must be used to resolve the issue. Pertinent factors include whether the rights involve general or specified commodities, the character of the area served in terms of industry and population, the number of carriers involved in a similar service, whether the rights are radial or nonradial, and whether the financial and material capabilities of the carrier have been utilized as far as practicable. Herman Bros., Inc. v. Spector Industries, Inc. 513

Motor Vehicles.
1. A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight as a matter of law and no recovery can be had for damages resulting from a collision with a passing train. Wyatt v. Burlington Northern, Inc. 212
2. A motorist approaching a railroad grade crossing shall stop and not proceed across the crossing, until he can do so safely, if a train approaching within approximately one quarter mile of the crossing emits a signal audible from such distance, or the train is plainly visible and in hazardous proximity to the crossing. Neb. Rev. Stat. § 39-655(1) (Reissue 1978). Wyatt v. Burlington Northern, Inc. 212
3. The duty of a motorist approaching a grade crossing is such that even if the train fails to give warning signals of its approach to the crossing, the motorist can not recover if he recklessly fails and neglects to have his vehicle under control where by looking and listening at the proper time he could have seen the approaching train in time to stop before reaching the crossing. Wyatt v. Burlington Northern, Inc. 212
4. There is no duty on the part of the engineer operating a railroad train to yield the right-of-way to a motorist approaching a grade crossing until the situation is such as to

indicate to a reasonably prudent person that to proceed would probably result in a collision. At that time it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way. Wyatt v. Burlington Northern, Inc. 212

5. The sudden emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. Stanek v. Swierczek 357
6. It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead, and the rule applies to driving in the daytime when vision is obstructed by physical conditions. Stanek v. Swierczek 357
7. Generally, less stringent warrant requirements have been applied to vehicles. State v. Watts 371
8. One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. State v. Watts 371
9. The smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where there is sufficient foundation as to the expertise of the officer making the search. State v. Watts 371
10. The finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle. State v. Watts 371
11. Neb. Rev. Stat. § 60-509.01 (Reissue 1978), providing for uninsured motorist coverage, was enacted for the benefit of the innocent victim of a financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose. Lane v. State Farm Mut. Automobile Ins. Co. 396
12. It is not a prerequisite to recovery under an uninsured motorist policy provision that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the automobile liability insurer. Lane v. State Farm Mut. Automobile Ins. Co. 396
13. Unless specifically made applicable, the provisions of Neb. Rev. Stat. §§ 39-601 to 39-6,122 (Reissue 1978), except

those provisions relative to careless driving and to reckless driving, shall not apply to: (1) Persons, teams of draft animals, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work. Neb. Rev. Stat. § 39-606 (Reissue 1978). Beebe v. Sorensen Sand & Gravel Co. 559

14. It is unlawful for the driver of a vehicle to turn left unless and until such movement can be made with reasonable safety. Burrows v. Jacobsen 778
15. The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard. Burrows v. Jacobsen 778
16. The duty of a guest riding in an automobile is to use due care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. A guest is not required to use the same degree of care as devolves upon the driver. If a guest perceives danger, or should anticipate danger, he should warn the driver. Ordinarily a guest need not watch the road or advise the driver in the management of the car. Drawbridge and Misterek v. Douglas County 806
17. A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. Drawbridge and Misterek v. Douglas County 806
18. Generally, it is negligence as a matter of law to drive so fast at night that the driver is unable to stop in time to avoid a collision with an object on the road which is within the range of his headlights. Drawbridge and Misterek v. Douglas County 806

Municipal Corporations.

A city of the primary class is granted power by the Legislature to make all ordinances not inconsistent with the general laws of the state as may be necessary to promote the public health, safety, and welfare. The authority to enforce such ordinances is granted to such city in the area which is within the city or within 3 miles of the city and outside of any organized city or village. Neb. Rev. Stat. § 15-236 (Reissue 1977). State v. Austin 174

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2. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. Courts will not pass upon a question of constitutionality unless it becomes necessary to do so. State v. Austin 174
3. The Legislature may provide for the trial of petty offenses in violation of a city or village ordinance without a jury when Article I, § 6, of the Constitution of Nebraska is not violated. State v. Flores 302
4. A defendant who is charged with the violation of a city ordinance, with a maximum authorized penalty of 6 months' incarceration, is not entitled to a jury trial under the U.S. Constitution. State v. Flores 302

Negligence.

1. The question whether negligence is such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, taking into consideration the foreseeability of the intervening act, is a question of fact. Brown v. Nebraska P.P. Dist. 61
2. A possessor of land is not an insurer of the safety of business invitees on its land. Syas v. Nebraska Methodist Hospital Foundation 201
3. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (3) fails to exercise reasonable care to protect them against the danger. Syas v. Nebraska Methodist Hospital Foundation 201
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6. A right to recover on a contract does not obtain when the party seeking to recover has performed its obligations in a negligent manner. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
7. The sudden emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. Stanek v. Swierczek 357
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9. It is a fundamental principle of the law of damages that a person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of medical care and expense incurred for the treatment of the injuries to the time of trial, as well as the cost of those reasonably certain to be incurred in the future. Stanek v. Swierczek 357
10. In an action for wrongful death, the plaintiff may establish by a preponderance of the evidence that the wrongful act or omission of the defendant was the proximate cause of death and such connection may be shown by circumstantial evidence. Beebe v. Sorensen Sand & Gravel Co. 559
11. What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine.
    Beebe v. Sorensen Sand & Gravel Co. 559
    Stephen v. City of Lincoln 792

Camerlinck v. Thomas 843
12. The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury. Burrows v. Jacobsen 778
13. Negligence is not presumed and the mere happening of an accident does not prove negligence. Burrows v. Jacobsen ... 778
14. Where, in an action to recover for personal injuries, the jury is properly instructed as to the burden of proving the negligence charged against defendant as a proximate cause of the injury, the defense that the negligence of a third person not a party to the action is the sole proximate cause is not an affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is entirely consistent with and provable under the general issue where the burden of proof remains with the plaintiff to prove the alleged negligence of the defendant. Burrows v. Jacobsen 778
15. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause. Stephen v. City of Lincoln 792
16. A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. Crawford v. Ham 802
17. One who places an obstruction upon a highway in such a manner that it is dangerous to others using the highway has a duty to remove the obstruction or to use due care to warn others upon the highway of the danger incident to the obstruction. Drawbridge and Misterek v. Douglas County 806
18. A failure to so warn the traveling public is continuing negligence as distinguished from a condition. Drawbridge and Misterek v. Douglas County 806
19. The duty of a guest riding in an automobile is to use due care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. A guest is not required to use the same degree of care as devolves upon the driver. If a guest perceives danger, or should anticipate danger, he should warn the driver.

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21. Generally, it is negligence as a matter of law to drive so fast at night that the driver is unable to stop in time to avoid a collision with an object on the road which is within the range of his headlights. Drawbridge and Misterek v. Douglas County 806
22. If the actor is a child, the standard of care to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under the circumstances. Camerlinck v. Thomas 843

Notice.

Appellant, who was served with a summons and petition which notified him of the nature and purpose of the proceeding, its possible consequence, and the specific factual allegations on which termination of his parental rights might be based, received adequate notice. In re Interest of Bird Head 575

Options to Buy or Sell.

1. A broker is not entitled to a commission from a seller for producing a ready, willing, and able buyer, where the buyer is only willing to execute an option and the seller does not prevent exercise of the option. DaLee Realty, Inc. v. Kuhl 6
2. The nature of a contract as an option or obligation to purchase is to be determined not by the name which the parties have given it but by the nature of the obligation which it imposes. DaLee Realty, Inc. v. Kuhl 6
3. An option is a binding offer to sell or buy, but is not a purchase agreement. DaLee Realty, Inc. v. Kuhl 6

Parental Rights.

1. Neb. Rev. Stat. § 43-209 (Reissue 1978) sets out six independent conditions, any one of which existing alone will justify termination of parental rights. In re Interest of Wood and Linden 18
2. There is no requirement that the court must implement a rehabilitation program for the parent of a child found to be dependent and neglected. In re Interest of Wood and

Linden 18
3. The right of a parent to custody and control of his or her child is not an inalienable right.
In re Interest of Wood and Linden 18
In re Interest of J.L.L. 76
In re Interest of Chirnside 750
4. Where the juvenile court has made a finding of neglect under Neb. Rev. Stat. § 43-209(2) (Reissue 1978), it need not afford the parent opportunity to correct the conditions underlying the finding before terminating parental rights. In re Interest of Wagner and Russell 33
5. Although a parent's parental rights should not be terminated for the sole reason of conviction of crime and incarceration, the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated. In re Interest of Wagner and Russell 33
6. In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. In re Interest of Wagner and Russell 33
7. An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be supported by clear and convincing evidence.
In re Interest of J.L.L. 76
In re Interest of Hiatt 195
In re Interest of Bird Head 575
In re Interest of Burbanks and Rima 676
In re Interest of Hitt 900
8. Parental rights between a parent and child may be terminated when the parent has abandoned the child for 6 months or more immediately prior to the filing of the petition and such action is in the best interests of the child. Neb. Rev. Stat. § 43-209 (Reissue 1978). In re Interest of Shelby 140
9. The juvenile court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children and it appears by the evidence that one or more of the conditions set out in Neb. Rev. Stat. § 43-209 (Reissue 1978) exist. In re Interest of Hiatt 195
10. Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. In re Interest of Hiatt 195
11. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final disposition be

made without delay. In re Interest of Kain 229
12. The interest of the state which is protected by Neb. Rev. Stat. § 43-209 (Reissue 1978) is that of protecting minor children from serious abuse and serious neglect. In re Interest of Holley 437
13. The interest of the state protected by Neb. Rev. Stat. § 43-209 (Reissue 1978) is a compelling state interest. In re Interest of Holley 437
14. The word "may" in Neb. Rev. Stat. § 43-209 (Reissue 1978) is designed to allow the judge to weigh each individual case in the light of the degree of seriousness of the conduct, its effect upon the best interests of the child, the likelihood of continuation, and the results of attempted corrective measures, and then to determine whether or not parental rights must be terminated. Such discretion is not constitutionally impermissible. In re Interest of Holley 437
15. Rules governing termination of parental rights are intended to recognize the integrity of the family and to bring about parental termination only when that appears to be required and no other reasonable alternative exists.
In re Interest of Holley 437
In re Interest of D. 529
16. Courts have the discretion to experiment with foster care and visitation arrangements while keeping in mind that there is a compelling state interest to be protected and that the best interests of the child may require complete termination of parental rights eventually. In re Interest of Holley 437
17. The rule has been long established in this state that courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. In re Interest of D. 529
18. Courts cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's lifestyle is different or unusual. Neither can a court deprive the parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child. In re Interest of D. .. 529
19. Appellant, who was served with a summons and petition which notified him of the nature and purpose of the proceeding, its possible consequence, and the specific factual allegations on which termination of his parental rights might be based, received adequate notice. In re Interest of Bird Head 575
20. An action for termination of parental rights is reviewed by this court de novo upon the record. In re Interest of Bird

Head 575
21. Parental rights may not be terminated under the following provision of Neb. Rev. Stat. § 43-209(6) (Reissue 1978): "Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination," except where the correctional efforts have been directed to the conditions upon which the adjudication was based. In re Interest of Burbanks and Rima 676
22. The court may terminate all parental rights between the parents and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that the parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged, indeterminate period. In re Interest of Chirnside 750
22. The right of parents to maintain custody of their child is a natural right, subject only to the paramount interests which the public has in the protection of the rights of a child. In re Interest of Hitt 900
24. A court of this state may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. In re Interest of Hitt 900

Plea Bargains.

A defendant has no legal basis to rely on a sentence recommended as part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement. State v. Tweedy 649

Pleadings.

1. If the object of a petition is to set aside an order approving a final account between a guardian or a conservator and his ward for fraud, it must allege some distinct and specific act of fraud from which the petitioner suffered injury. It is also necessary that such petitioner negative all fault or negligence on his part. In re Guardianship of Bremer ... 267
2. An answer to a petition which fails to allege an essential element of a claimed defense of economic duress or business coercion is subject to a demurrer. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
3. If an answer properly pleads a defense, it is error to prohibit a defendant from offering evidence in support thereof. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327

4. The term "application" is a generic term which includes, but is not limited to, motions. Doyle v. Union Ins. Co. 385
5. While a court will not ordinarily take judicial notice of its records in another case, it is proper in considering a demurrer to take judicial notice of the records in another case which is so closely interwoven as to be interdependent. Fowler v. Nat. Bank of Commerce 861
6. Leave to amend a petition should ordinarily be granted after a demurrer is sustained. However, when it is clear that no reasonable possibility exists that plaintiff will, by amendment, be able to state a cause of action, leave to amend may be denied. Fowler v. Nat. Bank of Commerce 861
7. The prayer of a pleading tenders no issue, and neither adds to nor takes from the evidence required of either party. The prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence. Sullivan v. General United Life Ins. Co. 872

Pleas.

1. Although the preferred procedure for ascertaining whether or not a factual basis exists to support a guilty plea is to inquire directly of the defendant, an examination before sentencing of a presentence report containing such facts is an acceptable alternative. State v. Tweedy 649
2. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. State v. Tweedy 649
3. A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights. State v. Tweedy 649

Political Subdivisions.

An appeal to the District Court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465

Political Subdivisions Tort Claims Act.

1. In a proceeding brought under the Political Subdivisions Tort Claims Act, the findings of fact by the trial court

will not be overturned unless clearly wrong. Lee v. City of Omaha 345
2. Findings of fact made by the District Court in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977), will not be disturbed on appeal unless clearly wrong. Watson v. City of Omaha 835

Post Conviction.

1. An evidentiary hearing in a proceeding for post conviction relief may be denied if the trial court finds, on examination of its files and records, that the proceeding is without foundation. State v. Nokes 293
2. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Nokes 293
3. In post conviction relief cases the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. State v. Holloman 828
4. In a post conviction proceeding the burden of proof is on the movant to establish a basis for relief, and where such burden is not met a denial of that requested relief is required. State v. Holloman 828

Prejudgment Interest.

1. Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
2. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. First Data Resources, Inc. v. Omaha Steaks Int., Inc. ... 327
3. An order of the Commission of Industrial Relations, once sued upon, may bear prejudgment interest, just as certain other contracts sued upon may bear prejudgment interest; however, such fact does not authorize the Commission of Industrial Relations to order the payment of interest as a part of its order. Such authority lies solely with an appropriate court and comes into effect only when entered by that appropriate court, in the same manner to which any other suit upon a contract would be subject to the payment of prejudgment interest if and when ordered by an appropriate court. IBEW Local 763 v. Omaha P.P. Dist. 335

Prescriptive Easements.

1. A prescriptive right is not looked upon with favor, and

generally must be proved by clear, convincing, and satisfactory evidence. Sturm v. Mau 865
2. To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land. Sturm v. Mau 865
3. Ordinarily, where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. Under such circumstances, the owner of the servient estate, in order to avoid acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive. Sturm v. Mau 865
4. The presumption of adverse use does not arise when a prescriptive easement is claimed over land which is unenclosed and which has no defined pathway across it. Sturm v. Mau 865
5. It is not indispensable to the establishment of a highway by prescription that there be no deviation in the line of travel; if the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like, there have been slight changes in the line of travel. Sturm v. Mau 865
6. A diminution in the number of users does not constitute an abandonment of a road acquired by prescription. Sturm v. Mau 865

Principal and Agent.
1. It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued. Manzer v. Pentico 364
2. If a contract contemplates that an agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency. Oehlrich v. Gateway Realty of Columbus, Inc. 417

Principal and Surety.
A bond does not cover defaults of the principal occurring prior to the effective date of the bond, unless the bond expressly provides otherwise, for it cannot be assumed that

the surety intended to be bound by the past delinquencies of the principal. Stock v. Meissner 636

Probable Cause.

1. The smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where there is sufficient foundation as to the expertise of the officer making the search. State v. Watts 371
2. The finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle. State v. Watts 371
3. The test of probable cause for a warrantless arrest is whether, at the moment, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. State v. Nowicki 640
4. Probable cause is to be evaluated by the collective information of the police engaged in a common investigation. State v. Nowicki 640

Probation and Parole.

1. No defendant, once convicted, is entitled to be placed on probation as a matter of law. State v. Johnson 308
2. When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life. State v. Lingle 492
3. Conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional. State v. Lingle 492
4. While a person is on probation his expectations of privacy are less than those of other citizens not so categorized. State v. Lingle 492
5. Requiring the execution of a waiver of extradition as a condition precedent to probation does not render the waiver involuntary without a specific showing of how such a condition was coercive as applied in the particular case. State v. Lingle 492

Proof.

1. A purchaser of goods under the Uniform Commercial Code claiming a breach of warranty must prove not only the

warranty and the breach thereof; he must also prove the cause of the loss and the extent thereof. Settell's, Inc. v. Pitney Bowes, Inc. 26
2. Damages must be pled and proved, and the failure to offer proof on the issue of the value of goods as accepted will foreclose the method of determining damages from the court's consideration. Settell's, Inc. v. Pitney Bowes, Inc. 26
3. The one attacking the exemption of farm laborers from the provisions of the Workmen's Compensation Act as a violation of equal protection has the burden of proving that there is no rational basis for the classification. Otto v. Hahn 114
4. Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Mack v. Dale Electronics, Inc. 367
5. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. Mack v. Dale Electronics, Inc. 367
6. The burden is on the applicant for a certificate of public convenience and necessity to show he has met all the requirements of the statutes. In re Application of Greyhound Lines, Inc. 430
7. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
8. The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment. Riha v. St. Mary's Church & School, Inc. 539
9. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. Riha v. St. Mary's Church & School, Inc. 539
10. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony. Riha v. St. Mary's Church & School, Inc. 539
11. In an action for wrongful death, the plaintiff may establish by a preponderance of the evidence that the wrongful act or omission of the defendant was the proximate cause of death

and such connection may be shown by circumstantial evidence. Beebe v. Sorensen Sand & Gravel Co. 559

12. Where, in an action to recover for personal injuries, the jury is properly instructed as to the burden of proving the negligence charged against defendant as a proximate cause of the injury, the defense that the negligence of a third person not a party to the action is the sole proximate cause is not an affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is entirely consistent with and provable under the general issue where the burden of proof remains with the plaintiff to prove the alleged negligence of the defendant. Burrows v. Jacobsen 778
13. It is the duty of the proponent of a will, in the first instance, to make a prima facie case as to testamentary capacity; it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. In re Estate of Schoch 812
14. Under the residual hearsay exception found in Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1979), the proponent of the evidence has the burden of establishing each of the conditions of admissibility imposed by the rule. In re Estate of Schoch 812
15. In post conviction relief cases the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. State v. Holloman 828
16. In a post conviction proceeding the burden of proof is on the movant to establish a basis for relief, and where such burden is not met a denial of that requested relief is required. State v. Holloman 828
17. A prescriptive right is not looked upon with favor, and generally must be proved by clear, convincing, and satisfactory evidence. Sturm v. Mau 865
18. Ordinarily, where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. Under such circumstances, the owner of the servient estate, in order to avoid acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive. Sturm v. Mau 865
19. When a workmen's compensation claimant is alleged to have suffered a disability rising out of and in the course of his employment which consists of the aggravation of a preexisting condition, the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition. Engel v. Nebraska Methodist Hospital 878

Proper Lookout.

1. A motorist must see what is in plain sight. Burrows v. Jacobsen 778
2. Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving. Burrows v. Jacobsen 778

Property Division.

1. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Kullbom v. Kullbom 145
2. If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested. Neb. Rev. Stat. § 42-366(8) (Cum. Supp. 1980). Kullbom v. Kullbom 145
3. The trial court retains broad discretion in valuing pension rights and in dividing such rights between the parties. Kullbom v. Kullbom 145
4. The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. Johnson v. Johnson 317
5. Generally speaking, awards in cases of this kind vary from one-third to one-half the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so where the marriage is of long duration and the parties are the parents of the children involved. Johnson v. Johnson 317
6. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
   Johnson v. Johnson 317
   Kocarnik v. Kocarnik 454
   Redmond v. Redmond 745
7. The trial court has the inherent power, in adjusting the rights of the parties, to provide that a money allowance to be

paid in installments shall not draw interest until a certain date. Johnson v. Johnson 317
8. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. Johnson v. Johnson 317

Prosecuting Attorneys.
1. So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file, generally rests entirely in his discretion. Within the limits set by the Legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. White 218
2. There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work. State v. Dandridge 885
3. Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct. State v. Dandridge 885

Prosecutorial Misconduct.
An argument by a prosecuting attorney which is based on the evidence and inferences drawn therefrom does not ordinarily constitute misconduct. State v. Dandridge 885

Proximate Cause.
1. The question whether negligence is such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, taking into consideration the foreseeability of the intervening act, is a question of fact. Brown v. Nebraska P.P. Dist. 61
2. The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an "accident" arising out of and in the course of employment, entitling the individual to compensation under the Nebraska Workmen's Compensation Act. In order to receive that compensation it is necessary that the employee establish that the difficulties which the employee is experiencing were caused by an "accident" as defined by the Workmen's Compensation Act. Mack v. Dale Electronics, Inc. 367

Public Purpose.
1. Unless restricted by some provision of the state or federal

Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. Lenstrom v. Thone 783

2. Legislation which serves a public purpose is not constitutionally impermissible because incidental benefits may accrue to others. Lenstrom v. Thone 783

Public Service Commission.

1. Upon an appeal from an order of the commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
   In re Application of Greyhound Lines, Inc. 430
   Herman Bros., Inc. v. Spector Industries, Inc. 513
2. This court will not disturb an order of the commission based on evidence unless the evidence shows that the order was unreasonable or arbitrary. In re Application of Greyhound Lines, Inc. 430
3. The determination of the public interest is one that is peculiarly for the determination of the commission. In re Application of Greyhound Lines, Inc. 430
4. If there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary and capricious. In re Application of Greyhound Lines, Inc. 430
5. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.
   Herman Bros., Inc. v. Spector Industries, Inc. 513
   In re Application of Best 524
6. Where commission approval of a transfer of authority is requested under Neb. Rev. Stat. § 75-318 (Reissue 1976), and an issue of dormancy is properly raised, the Nebraska Public Service Commission must determine both the fact of dormancy and, on the basis of the evidence, whether the public convenience and necessity require the transfer. Herman Bros., Inc. v. Spector Industries, Inc. 513
7. There are no mechanical rules for determining when rights

have become dormant, and the test of substantiality must be used to resolve the issue. Pertinent factors include whether the rights involve general or specified commodities, the character of the area served in terms of industry and population, the number of carriers involved in a similar service, whether the rights are radial or nonradial, and whether the financial and material capabilities of the carrier have been utilized as far as practicable. Herman Bros., Inc. v. Spector Industries, Inc. 513

8. Before granting a certificate of convenience and necessity, the commission must find that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines does not or will not, within a reasonable time, receive reasonably adequate telephone service from the telephone company already serving the territory. Neb. Rev. Stat. § 75-604(2) (Reissue 1976). In re Application of Best 524

Questions of Law.

When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such contract is a question of law. Oehlrich v. Gateway Realty of Columbus, Inc. 417

Railroads.

1. A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight as a matter of law and no recovery can be had for damages resulting from a collision with a passing train. Wyatt v. Burlington Northern, Inc. 212
2. A motorist approaching a railroad grade crossing shall stop and not proceed across the crossing, until he can do so safely, if a train approaching within approximately one quarter mile of the crossing emits a signal audible from such distance, or the train is plainly visible and in hazardous proximity to the crossing. Neb. Rev. Stat. § 39-655(1) (Reissue 1978). Wyatt v. Burlington Northern, Inc. 212
3. The duty of a motorist approaching a grade crossing is such that even if the train fails to give warning signals of its approach to the crossing, the motorist can not recover if he recklessly fails and neglects to have his vehicle under control where by looking and listening at the proper time he could have seen the approaching train in time to stop before

reaching the crossing. Wyatt v. Burlington Northern, Inc. 212
4. There is no duty on the part of the engineer operating a railroad train to yield the right-of-way to a motorist approaching a grade crossing until the situation is such as to indicate to a reasonably prudent person that to proceed would probably result in a collision. At that time it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way. Wyatt v. Burlington Northern, Inc. 212

Recreation Liability Act.

The term "owner," as used in the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1978), includes a political subdivision as well as a private person. Watson v. City of Omaha 835

Releases.

1. A release by an injured party of the tort-feasor responsible for the original injury does not, in the absence of language indicative of such an intention on the part of the parties, preclude an action by the injured party against a physician or hospital for negligent treatment of the original injury. Scheideler v. Elias 601
2. Two factors are controlling in determining the effect of an agreement purporting to operate as a release: (1) Whether the injured party has received full satisfaction; and (2) Whether the parties intended that the release be in full satisfaction of the injured party's claim, thus releasing all successive tort-feasors from liability. Such questions are for the trier of fact to decide. Scheideler v. Elias 601

Replevin.

The thresher's lien statute gives to the holder of a thresher's lien the rights of enforcement given to owners of secured interests in property as outlined in Neb. U.C.C. art. 9 (Reissue 1971), including the right to bring an action in replevin. Honstein Trucking v. Sandhills Beef, Inc. 422

Res Judicata

The conclusiveness of a prior judgment precluding subsequent litigation of the same cause of action between the same parties is much broader in its application than a determination of the questions actually involved in the prior action. Gaspar v. Flott 260

Right-of-Way.

1. There is no duty on the part of the engineer operating a railroad train to yield the right-of-way to a motorist approaching

a grade crossing until the situation is such as to indicate to a reasonably prudent person that to proceed would probably result in a collision. At that time it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way. Wyatt v. Burlington Northern, Inc. 212
2. The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard. Burrows v. Jacobsen 778
3. By "right-of-way" is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other. Burrows v. Jacobsen 778
4. Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving. Burrows v. Jacobsen 778
5. One does not forfeit his right-of-way by driving at an unlawful speed. Burrows v. Jacobsen 778

Right to Counsel.

1. The sixth amendment right to assistance of counsel at a police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information. State v. Smith 86
2. Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. State v. Teater 127

Rules of Evidence.

1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Neb. Rev. Stat. § 27-703 (Reissue 1979). Lincoln Tel. & Tel. Co. v. County

Board of Equalization 465
2. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Neb. Rev. Stat. § 27-702 (Reissue 1979). State v. Loveless 583

Search and Seizure.

1. Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant. State v. Resler 249
2. The basic elements of the emergency doctrine exception may be summarized in the following manner: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) The search must not be primarily motivated by intent to arrest and seize evidence; and (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. State v. Resler 249
3. One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. State v. Watts 371
4. The finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle. State v. Watts 371
5. The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search. State v. Watts 371
6. Under certain circumstances, a furtive movement can produce the legal justification to search an automobile. State v.

Watts 371
7. The capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. State v. Cemper 376
8. A person has no legitimate expectation of privacy in an open field in which he has no personal ownership or possessory rights, and cannot claim the protection of the fourth amendment as to unreasonable searches and seizures. State v. Cemper 376
9. Conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional. State v. Lingle 492
10. The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it. State v. Billups 737
11. The question of whether a consent to search is voluntarily given is a question of fact. State v. Billups 737
12. When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. State v. Billups 737
13. A court may take judicial notice of the fact that substances such as cocaine, LSD, and certain forms of prepared marijuana may be easily and quickly disposed of by flushing down a toilet or drain. State v. Meyer 757

Search Warrants.

1. Generally, less stringent warrant requirements have been applied to vehicles. State v. Watts 371
2. The provisions of Neb. Rev. Stat. § 29-411 (Reissue 1979), providing for entry for search pursuant to warrant "without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of . . . if such notice be given," do not offend the fourth amendment prohibition against unreasonable search and seizure. State v. Meyer 757
3. Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct

personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was creditable or his information reliable. State v. Meyer ... 757

4. An affidavit for a search warrant is not defective simply because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay. Firsthand knowledge of an informant, acquired by sight or hearing, is self-corroborating and tends to fulfill both aspects of the *Aguilar* test. State v. Meyer 757

Second Injury Fund.

1. Under Neb. Rev. Stat. § 48-128 (Reissue 1978), if an employee who has a preexisting permanent partial disability which was known to the employer prior to the occurrence of a subsequent compensable injury receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury considered alone and of itself, the employer at the time of the last injury is liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated from the Second Injury Fund. Akins v. Happy Hour, Inc. 236
2. The purpose of Neb. Rev. Stat. § 48-128 (Reissue 1978) is not to provide compensation for the previous disability but to provide compensation for permanent partial or total disability resulting from a combination of the previous fact condition with a compensable injury. It is the previous fact condition combined with a second compensable injury causing permanent partial or total disability in fact that establishes the right of the employee to compensation from the Second Injury Fund. Akins v. Happy Hour, Inc. 236

Secured Transactions.

1. The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a security interest under the Uniform Commercial Code given to secure its payment. Ceres Fertilizer, Inc. v. Beekman 447
2. Upon dissolution of an attachment, ordinarily all property attached should be returned to the defendant owner. Ceres Fertilizer, Inc. v. Beekman 447

Sentences.

1. A sentence to life imprisonment for second degree murder is effective as an indeterminate sentence of 10 years to life. State v. Moore 88
2. When sentencing a criminal defendant to a term of imprisonment under the indeterminate sentencing statute, the minimum limit of the sentence fixed by the court shall not be less than the minimum provided by law nor more than one-third the maximum term. Neb. Rev. Stat. § 83-1,105 (Reissue 1976).
   State v. Thomas 304
   State v. Johnson 308
3. A judgment denying probation and imposing a sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion. State v. Rosenberry 383
4. A sentence imposed which is within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Jackson 486
5. Upon conviction for the use of a firearm to commit a felony, the statute requires that any sentence is to be served consecutive to any other sentence imposed. State v. Jackson 486
6. When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life. State v. Lingle 492
7. A defendant has no legal basis to rely on a sentence recommended as part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement. State v. Tweedy 649
8. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Meyer 757
9. The District Court after arrest may consider time spent in a medical institution pursuant to a valid mental health commitment in determining credit for time to be applied against the sentence. State v. Prosser 766
10. It was not an abuse of discretion for the trial court to fail to give credit for time spent in a mental institution where the sentence pronounced was not the statutory maximum for the offense. State v. Prosser 766

Sexual Misconduct.

Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children,

but it is not necessarily determinative. The nature of the act or acts, the circumstances surrounding the commission thereof, and the probable effects as are related to the future welfare of the children must be carefully considered. Helgenberger v. Helgenberger 184

Statute of Frauds.

A delivery alone by the seller is insufficient to take an oral contract for the sale of goods of the price of $500 or more out of the statute of frauds. The goods must have been received and accepted before avoidance of the statute of frauds is recognized. In re Estate of Nelsen 730

Statutes.

1. Neb. Rev. Stat. § 43-209 (Reissue 1978) is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness. In re Interest of J.L.L. 76
2. Statutes in pari materia must be construed together. SID No. 1 v. County of Adams 108
3. An independent legislative act covering the entire subject of legislation to which it relates may incidentally modify or change existing statutes without referring to them. SID No. 1 v. County of Adams 108
4. Where a general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication. SID No. 1 v. County of Adams 108
5. For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. Sharski 122
6. Difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous. State v. Sharski 122
7. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. State v. Farr 163
8. The legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances. State v. Farr 163

9. It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. State v. Farr 163
10. A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served. State v. Farr .. 163
11. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. Courts will not pass upon a question of constitutionality unless it becomes necessary to do so. State v. Austin 174
12. Neb. Rev. Stat. § 28-416(6)(a) (Reissue 1979) merely authorizes the issuance of citation in the case of certain violations and does not prohibit a police officer from arresting the offender whenever otherwise authorized by law. State v. Watts 371
13. Neb. Rev. Stat. § 60-509.01 (Reissue 1978), providing for uninsured motorist coverage, was enacted for the benefit of the innocent victim of a financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose. Lane v. State Farm Mut. Automobile Ins. Co. .. 396
14. A duly enacted statute is presumed constitutional and may not be invalidated by the court unless clearly in contravention of a provision of fundamental law or of public policy. Lenstrom v. Thone 783

Subrogation.

Under the "common fund" doctrine, where the holder of subrogation rights does not come into the action, whether he refuses to do so or acquiesces the action brought by the plaintiff, but accepts the avails of the litigation, he is subjected to his proportionate share of the expenses thereof, including attorney fees. However, this rule is not applicable where the party sought to be charged has employed his or its own attorney and has actively participated in the litigation, and such counsel has not terminated, abandoned, or acquiesced in the representation of his client by other counsel. Hammond v. Nebraska Nat. Gas Co. 616

Substantial Performance.

1. A party to whom performance is owed should receive at least approximately what it bargained for. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
2. "Substantial performance" is a relative term and whether it exists or not is a question to be determined in each case with reference to the existing facts and circumstances. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327

Summary Judgment.

1. The primary purpose of the summary judgment statute is to

pierce sham pleadings and to further dispose of cases where there is no genuine claim or defense. Brown v. Nebraska P.P. Dist. 61

2. The court examines the evidence, with a view most favorable to the party against whom the motion is directed, to discover if any real issue of fact exists. If reasonable persons might reach different conclusions, the motion should be denied and the case tried on its merits. Brown v. Nebraska P.P. Dist. 61
3. Summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.
   Manzer v. Pentico 364
   Oehlrich v. Gateway Realty of Columbus, Inc. 417
4. The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the trial court must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt.
   Scheideler v. Elias 601
   Stock v. Meissner 636

Tape Recordings.

1. Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid. State v. Loveless 583
2. Unless the unintelligible portions of a tape recording are so substantial as to render the recording as a whole untrustworthy, the recording is admissible and the decision whether to admit it should be left to the sound discretion of the trial judge. State v. Loveless 583

Taxation.

1. Neb. Rev. Stat. § 77-112 (Reissue 1976) does not require the taxing authorities to utilize all the factors set forth therein in ascertaining the actual value of property for taxation. Instead, they may use such factors or a combination thereof which are determined to be applicable in determining actual value under the Constitution of Nebraska. LaGord Assoc. v. County of Cass 99

2. In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low. LaGord Assoc. v. County of Cass 99
3. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. LaGord Assoc. v. County of Cass 99
4. Taxes on tangible property are to be levied by valuation uniformly and proportionately. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
5. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
6. Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
7. Tangible property is to be valued at actual value for tax purposes and assessed at 35 percent of actual value; however, an assessment will not be set aside merely because it was not assessed at actual value where property is proportionately valued in a reasonable degree. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
8. Approximation of value and uniformity is all that can be accomplished and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the federal and state Constitutions is all that is required, and such provisions are satisfied when designed and manifest departure from the rules is avoided. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
9. In order for a taxpayer to secure a reduction in the assessed value of his property, it must be demonstrated that the assessed value is grossly excessive, or that its value has not

been fairly and proportionately equalized. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
10. For purposes of taxation, actual value, market value, and fair market value are synonymous terms. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465

Telecommunications.

Before granting a certificate of convenience and necessity, the commission must find that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines does not or will not, within a reasonable time, receive reasonably adequate telephone service from the telephone company already serving the territory. Neb. Rev. Stat. § 75-604(2) (Reissue 1976). In re Application of Best 524

Threshers' Liens.

1. The purpose of the thresher's lien law is to give notice by statute to all prospective purchasers of grain and to the owners thereof within 30 days after the completion of combining of the possible existence of a lien by the person who combined the grain. Honstein Trucking v. Sandhills Beef, Inc. 422
2. The purpose of the thresher's lien statute is to protect the rights to payment of the combiner who is not a party to the payment arrangements between the seller of the grain and the purchaser. Honstein Trucking v. Sandhills Beef, Inc. 422
3. The thresher's lien statute is remedial in nature and requires a liberal construction. Honstein Trucking v. Sandhills Beef, Inc. 422
4. The thresher's lien statute gives to the holder of a thresher's lien the rights of enforcement given to owners of secured interests in property as outlined in Neb. U.C.C. art. 9 (Reissue 1971), including the right to bring an action in replevin. Honstein Trucking v. Sandhills Beef, Inc. 422
5. Where one commingles property subject to a lien with other property alike in quality and value, the lien is not extinguished so long as there is on hand sufficient property alike in quality and value to satisfy the lien. Honstein Trucking v. Sandhills Beef, Inc. 422

Time.

1. After a verdict by a jury a motion for new trial must be made within 10 days after the verdict was rendered and accepted by the court, not from the date judgment was entered on the verdict. Novak v. Nelsen 728
2. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the

judgment or decree or the making of the final order. Novak v. Nelsen 728

Tort-feasors.

1. A release by an injured party of the tort-feasor responsible for the original injury does not, in the absence of language indicative of such an intention on the part of the parties, preclude an action by the injured party against a physician or hospital for negligent treatment of the original injury. Scheideler v. Elias 601
2. Two factors are controlling in determining the effect of an agreement purporting to operate as a release: (1) Whether the injured party has received full satisfaction; and (2) Whether the parties intended that the release be in full satisfaction of the injured party's claim, thus releasing all successive tort-feasors from liability. Such questions are for the trier of fact to decide. Scheideler v. Elias 601

Trial.

1. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Sherwood v. Brown 68
2. Jury instruction that a landlord may, in the absence of unusual circumstances, if any it finds, without violating its duty to exercise reasonable care for the safety of a tenant or a tenant's visitors, await the end of a snowstorm and a reasonable time thereafter before removing ice and/or snow from outside entrances, walks, platforms, or steps, *disapproved.* Danner v. Myott Park, Ltd. 103
3. A jury instruction which misstates issues or defenses and has a tendency to confuse the jury is erroneous. Danner v. Myott Park, Ltd. 103
4. Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury. Syas v. Nebraska Methodist Hospital Foundation 201
5. It is within the discretion of the District Court to take testimony orally for the determination of issues of fact arising upon motions, and not a right of either party to compel the adduction of such testimony. Doyle v. Union Ins. Co. 385
6. In a trial to the court in a law action, the findings of facts by the trial court have the force and effect of a jury verdict and will not be set aside unless clearly wrong. Honstein Trucking v. Sandhills Beef, Inc. 422

7. A trial court has broad discretion to exclude cumulative evidence. In re Estate of Schoch 812
8. The unexplained failure of a party to call or examine an available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party. In re Estate of Schoch 812
9. The relative convincing powers of the inferences to be drawn from failing to call or examine a witness and other evidence are for the determination of the trier of fact. In re Estate of Schoch 812
10. Where reasonable minds might draw different conclusions from the evidence, the question as to a child's negligence or contributory negligence under the circumstances is a matter for determination by the jury. Camerlinck v. Thomas ... 843

Trusts.

Where a constructive trust has been imposed, the court may trace the trust res into the hands of subsequent purchasers who are not bona fide purchasers for value and without notice. Sherwood v. Brown 68

Uniform Commercial Code.

1. A purchaser of goods under the Uniform Commercial Code claiming a breach of warranty must prove not only the warranty and the breach thereof; he must also prove the cause of the loss and the extent thereof. Settell's, Inc. v. Pitney Bowes, Inc. 26
2. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as warranted. Settell's, Inc. v. Pitney Bowes, Inc. 26
3. The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a security interest under the Uniform Commercial Code given to secure its payment. Ceres Fertilizer, Inc. v. Beekman 447
4. Performance of an oral contract for the sale of goods that is capable of apportionment is enforceable only as to that portion that has been either fully or partially performed. In re Estate of Nelsen 730

Valuation.

1. Neb. Rev. Stat. § 77-112 (Reissue 1976) does not require the taxing authorities to utilize all the factors set forth therein in ascertaining the actual value of property for taxation. Instead, they may use such factors or a combination thereof which are determined to be applicable in determin-

ing actual value under the Constitution of Nebraska. LaGord Assoc. v. County of Cass 99
2. In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low. LaGord Assoc. v. County of Cass 99
3. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. LaGord Assoc. v. County of Cass 99
4. Taxes on tangible property are to be levied by valuation uniformly and proportionately. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
5. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
6. Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
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8. Approximation of value and uniformity is all that can be accomplished and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the federal and state Constitutions is all that is required, and such provisions are satisfied when designed and manifest departure from the rules is avoided. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
9. In order for a taxpayer to secure a reduction in the assessed

value of his property, it must be demonstrated that the assessed value is grossly excessive, or that its value has not been fairly and proportionately equalized. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
10. For purposes of taxation, actual value, market value, and fair market value are synonymous terms. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465

Waiver.

1. Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. State v. Teater 127
2. The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Strickland ... 133
3. Requiring the execution of a waiver of extradition as a condition precedent to probation does not render the waiver involuntary without a specific showing of how such a condition was coercive as applied in the particular case. State v. Lingle 492
4. A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights. State v. Tweedy 649
5. A guardian ad litem may not waive the substantive rights of the ward, but must require proper legal proof. In re Interest of Burbanks and Rima 676
6. The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue. State v. Coleman 823

Warrantless Searches.

1. The smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where there is sufficient foundation as to the ex-

pertise of the officer making the search. State v. Watts . 371
2. The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it. State v. Billups 737
3. The question of whether a consent to search is voluntarily given is a question of fact. State v. Billups 737
4. When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. State v. Billups 737

Waters.

1. Generally, where surface waters, which ordinarily result from rainfall or melted snow, collect and flow into a natural drainage channel or depression, they may not be dammed, diverted, or otherwise repelled by the owner of the land upon which they flow. Schmidt v. Chimney Rock Irrigation Dist. 1
2. Where water from another source has been added to the water for which a defendant is liable and the combined water causes damage, it is incumbent upon the plaintiff to establish either that his entire damages would have occurred from the waters for which the defendant is liable, or to establish the amount of the damage caused by the water for which the defendant is liable. Schmidt v. Chimney Rock Irrigation Dist. 1

Wills.

1. One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty. In re Estate of Schoch 812
2. Testamentary capacity is tested by the state of a testator's mind at the time he executes his will. In re Estate of Schoch 812
3. Although competent evidence of a testator's condition of mind long before, closely approaching, and shortly after the execution of a will is admissible, it is received only to assist in revealing his state of mind at the time the will was executed. In re Estate of Schoch 812
4. It is the duty of the proponent of a will, in the first instance, to make a prima facie case as to testamentary capacity; it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. In re Estate of

Schoch 812

Wiretaps.

1. Once it is determined that a wiretap is illegal, any evidence derived from the wiretap must be suppressed. State v. Aulrich 546
2. Neb. Rev. Stat. §§ 86-701 to 86-712 (Reissue 1976) provide their own exclusionary rule which exists separate and independent of any court-created exclusionary rule involving the fourth amendment. State v. Aulrich 546
3. Neb. Rev. Stat. § 86-705 (Reissue 1976) requires that each application for a wiretap shall be made in writing upon oath or affirmation to a judge of the District Court, and shall include a full and complete statement of the facts and circumstances relied upon to justify the applicant's belief that an order should be issued. The application shall give a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed. State v. Lozano .. 772
4. Neither specific nor all possible investigative techniques must be tried before orders for wiretaps can be issued, nor is the government required to use a wiretap only as a last resort. State v. Lozano 772
5. It is not necessary for the State to utilize all investigative techniques before making an application for a wiretap. State v. Lozano 772
6. An affidavit is sufficient if it contains a full and complete statement of the underlying factual circumstances which justify the issuance of an order authorizing a wiretap. State v. Lozano 772
7. Staleness is an issue which must be decided on the peculiar facts of each case. State v. Lozano 772
8. Documents incorporated into an affidavit by reference need not be sworn to separately. State v. Lozano 772

Witnesses.

1. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admissible if elicited from him or established by public record during cross-examination, but only if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, or involved dishonesty or false statement. State v. Lingle 492
2. When a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question. State v. Stewart 719
3. The unexplained failure of a party to call or examine an

available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party. In re Estate of Schoch 812
4. The relative convincing powers of the inferences to be drawn from failing to call or examine a witness and other evidence are for the determination of the trier of fact. In re Estate of Schoch 812
5. The fact that an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction. State v. Dandridge 885

Words and Phrases.
1. An obstruction includes anything which will interfere with the public's use of the highway easement, and includes inanimate objects or substances which are just as dangerous and obstructive as solid obstructions. Brown v. Nebraska P.P. Dist. 61
2. Multiple injuries including a cerebral concussion and nasal fracture constitute serious bodily injuries which will support a conviction for first degree assault under Neb. Rev. Stat. § 28-308(1) (Reissue 1979). State v. Sare 91
3. An arrest is taking custody of another person for the purpose of holding or detaining him to answer a criminal charge. It is defined as the taking, seizing, or detaining of the person of another. State v. White 218
4. "Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. Akins v. Happy Hour, Inc. 236
5. A cause of action has been defined as consisting of a primary right possessed by the plaintiff and a corresponding duty devolving upon the defendant, combined with a delict or wrong done by the defendant. Gaspar v. Flott 260
6. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together, the marriage is irretrievably broken. Johnson v. Johnson 317
7. "Substantial performance" is a relative term and whether it exists or not is a question to be determined in each case with reference to the existing facts and circumstances. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
8. The term "application" is a generic term which includes,

but is not limited to, motions. Doyle v. Union Ins. Co. ... 385
9. Although it is frequently stated that medical testimony must be given with "reasonable medical certainty," it is sufficient when such testimony is stated in terms of "probability." In this connection, "reasonable certainty" and "reasonable probability" are one and the same thing. Lane v. State Farm Mut. Automobile Ins. Co. 396
10. In making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances. State v. Lingle 492
11. Whether or not a person is "actually engaged in work upon the surface of a highway" at the time of an alleged occurrence, so as to come under the provisions of Neb. Rev. Stat. § 39-606 (Reissue 1978), may be a question of fact, depending on the circumstances. Beebe v. Sorensen Sand & Gravel Co. 559
12. A child custody proceeding includes "any action which results in the termination of the parent-child relationship." 25 U.S.C.A. § 1903 (Supp. 1963 to 1980). In re Interest of Bird Head 575
13. By "right-of-way" is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other. Burrows v. Jacobsen 778
14. The term "owner," as used in the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1978), includes a political subdivision as well as a private person. Watson v. City of Omaha 835
15. The causation test of exertion "greater than nonemployment life" is applied by this court only in cases of heart attacks alleged to have been caused by the employment and not to other types of injury. Engel v. Nebraska Methodist Hospital 878

Workmen's Compensation.

1. The whole character of the employment must be considered to determine whether an employee is a farm laborer within the meaning of the Workmen's Compensation Act. Otto v. Hahn 114
2. The one attacking the exemption of farm laborers from the provisions of the Workmen's Compensation Act as a violation of equal protection has the burden of proving that there is no rational basis for the classification. Otto v. Hahn 114
3. "Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes

eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. Akins v. Happy Hour, Inc. 236

4. Under Neb. Rev. Stat. § 48-128 (Reissue 1978), if an employee who has a preexisting permanent partial disability which was known to the employer prior to the occurrence of a subsequent compensable injury receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury considered alone and of itself, the employer at the time of the last injury is liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated from the Second Injury Fund. Akins v. Happy Hour, Inc. 236
5. The purpose of Neb. Rev. Stat. § 48-128 (Reissue 1978) is not to provide compensation for the previous disability but to provide compensation for permanent partial or total disability resulting from a combination of the previous fact condition with a compensable injury. It is the previous fact condition combined with a second compensable injury causing permanent partial or total disability in fact that establishes the right of the employee to compensation from the Second Injury Fund. Akins v. Happy Hour, Inc. 236
6. Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee became disabled and entitled to compensation; and the date of injury, within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred and the period of limitations runs from that date. Osteen v. A.C. and S., Inc. 282
7. Where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the employer who most recently exposed the worker to the harmful substance is liable to pay the entire award. Osteen v. A.C. and S., Inc. 282
8. The policy of liberal construction of the Workmen's Compensation Act for the benefit of the claimant is the rule in Nebraska. Osteen v. A.C. and S., Inc. 282
9. Where the employment at the time of disability was not of a

kind contributing to the disease, the employer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation. Osteen v. A.C. and S., Inc. 282

10. An injurious exposure must be of the type which could cause the disease, given prolonged exposure, and once the requirement of some contributing exposure has been met, courts will not go on to weigh the relative amount or duration of the exposure under various employers. Osteen v. A.C. and S., Inc. 282
11. In a workmen's compensation case, the findings by the Workmen's Compensation Court have the force and effect of a jury verdict and will not be set aside unless clearly wrong.
    Osteen v. A.C. and S., Inc. 282
    Riha v. St. Mary's Church & School, Inc. 539
    Engel v. Nebraska Methodist Hospital 878
12. In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it. Osteen v. A.C. and S., Inc. 282
13. All calculations to be made under the provisions of Neb. Rev. Stat. § 48-121 (Reissue 1978), and amendments thereof, have reference to wages, percentages, and results as of the time of injury. Osteen v. A.C. and S., Inc. 282
14. The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an "accident" arising out of and in the course of employment, entitling the individual to compensation under the Nebraska Workmen's Compensation Act. In order to receive that compensation it is necessary that the employee establish that the difficulties which the employee is experiencing were caused by an "accident" as defined by the Workmen's Compensation Act. Mack v. Dale Electronics, Inc. 367
15. Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Mack v. Dale Electronics, Inc. 367
16. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must

show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. Mack v. Dale Electronics, Inc. 367
17. The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment. Riha v. St. Mary's Church & School, Inc. 539
18. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. Riha v. St. Mary's Church & School, Inc. 539
19. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony. Riha v. St. Mary's Church & School, Inc. 539
20. The causation test of exertion "greater than nonemployment life" is applied by this court only in cases of heart attacks alleged to have been caused by the employment and not to other types of injury. Engel v. Nebraska Methodist Hospital 878
21. When a workmen's compensation claimant is alleged to have suffered a disability rising out of and in the course of his employment which consists of the aggravation of a preexisting condition, the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition. Engel v. Nebraska Methodist Hospital 878